8A Am. Jur. 2d Bail and Recognizance I A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Bail and Recognizance
Karl Oakes, J.D.; and Marie K. Pesando, J.D.

I. In General

A. Overview

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 39, 60

A.L.R. Library

A.L.R. Index, Bail and Recognizance
West's A.L.R. Digest, Bail 39, 60

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Bail and Recognizance

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I. In General

A. Overview

§ 1. Definitions pertaining to bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 39

The term "bail" refers to the means of procuring the release from custody of one charged with an offense, while also ensuring his or her future attendance in court and compelling that person to remain within the court's jurisdiction.[1] Bail is a device that exists to ensure society's interest in having an accused answer to a criminal prosecution, without unduly restricting the accused's liberty and ignoring the right to be presumed innocent.[2] The word "bail" may also be used to refer to the security or bond for a defendant's appearance in court[3] or to designate the person in whose custody the defendant is placed when released from jail, and who acts as a surety for the appearance of the defendant or party under arrest.[4] This person is also sometimes described as the "surety,"[5] or the "bailor."[6] A person released on bail is generally referred to as the "principal."[7] "Bail" has also been used as a verb meaning the delivery of an accused to persons who, by law, become security for the accused's appearance in court when it is required.[8]

While released on bail prior to trial, a defendant is still considered to be within the constructive custody of the law.[9]

"Bail," under some statutes, includes release on personal recognizance, supervised release, and conditional release.[10] Release on one's own recognizance is sometimes referred to as release on judicial public bail.[11]

Footnotes

1 Manning v. State ex rel. Williams, 1942 OK 8, 190 Okla. 65, 120 P.2d 980 (1942).

2 State v. Shumate, 107 Wis. 2d 460, 319 N.W.2d 834 (1982).

3 People v. Leon, 82 Ill. App. 3d 344, 37 Ill. Dec. 842, 402 N.E.2d 844 (1st Dist. 1980); State v. Grillette, 588 So. 2d 1338 (La. Ct. App. 2d Cir. 1991); In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

4 Com. v. Cabral, 443 Mass. 171, 819 N.E.2d 951 (2005) (in older cases).
"Against bail," as used in a statute that specifies the statute of limitations for actions against bail, applies to actions against a surety. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

5 Com. v. Cabral, 443 Mass. 171, 819 N.E.2d 951 (2005); State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635 (1943); State v. Wright, 1943 OK 356, 193 Okla. 383, 143 P.2d 801 (1943); State v. Spring, 180 Tenn. 506, 176 S.W.2d 817 (1944).

6 State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947).

7 Com. v. Cabral, 443 Mass. 171, 819 N.E.2d 951 (2005); State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947); State v. Eller, 218 N.C. 365, 11 S.E.2d 295 (1940); Crain v. State, 66 Okla. Crim. 228, 90 P.2d 954 (1939); State v. Van Wagner, 16 Wash. 2d 54, 132 P.2d 359 (1942).

8 State v. Singletary, 153 N.J. Super. 505, 380 A.2d 302 (Law Div. 1977), judgment rev'd on other grounds, 165 N.J. Super. 421, 398 A.2d 576 (App. Div. 1979).

9 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992).

10 Pelekai v. White, 75 Haw. 357, 861 P.2d 1205 (1993).

11 State v. Blake, 642 So. 2d 959 (Ala. 1994).

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I. In General

A. Overview

§ 2. Purposes of bail

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West's Key Number Digest

West's Key Number Digest, Bail 39

The purpose of bail is to ensure[1] or secure[2] the presence or attendance of the accused at trial, that is, to guarantee the appearance of the accused before the court at such times as court may direct.[3] Furthermore, it has been said that the ultimate purpose of bail is to deter the flight of the defendant, while allowing the defendant to be released pending trial or appeal.[4] Another object is to allow an accused the opportunity to prepare a defense, while also serving to ensure the accused's presence at trial,[5] while preserving the presumption of innocence.[6]

The purpose of a pretrial bond has been said to be to prevent punishment before conviction,[7] and to secure the appearance of the person in court for trial[8] to answer the charges and respond to the judgment.[9] The purpose of an appearance bond is to ensure the appearance of a released defendant as required.[10] Similarly, the purpose of a general postconviction appearance bond is to ensure the appearance of a released defendant following a determination of an appeal or stay of the sentence.[11] The purpose of a bail bond has also been described as being to serve the convenience of the accused, without interfering with or defeating the administration of justice.[12] Furthermore, the view has also been expressed that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of criminal defendants.[13]

The purpose of bond is not to collect revenue.[14] Nor, given the presumption of innocence, is the object of bail to effect punishment in advance of conviction.[15] A sentencing court does not have the authority to impose bond, and to incarcerate a defendant on a failure to post it, for the apparent purpose of enforcing the collection of a fine.[16] Neither is bail a method to punish sureties.[17]

The purpose of a recognizance is merely to ensure the presence for trial of a person accused of a bailable offense.[18]

CUMULATIVE SUPPLEMENT

Cases:

The goal and purpose of bail statute for offenses other than an offenses punishable by death are clear: to permit pretrial release while ensuring that a defendant appears in court. Mass. Gen. Laws Ann. ch. 276, § 58. Commonwealth v. Norman, 484 Mass. 330, 142 N.E.3d 1 (2020).

The sole constitutionally legitimate purpose of monetary conditions of release is to provide additional assurance of the presence of an accused. State v. Lohr, 2020 VT 41, 236 A.3d 1277 (Vt. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Phillips v. State, 550 N.E.2d 1290 (Ind. 1990) (abrogated on other grounds by, Fry v. State, 990 N.E.2d 429 (Ind. 2013)); State v. Mosk, 257 So. 3d 206 (La. Ct. App. 4th Cir. 2018); City of Youngstown v. Edmonds, 2018-Ohio-3976, 2018 WL 4697004 (Ohio Ct. App. 7th Dist. Mahoning County 2018).

2 Commonwealth v. Unitt, 91 Mass. App. Ct. 93, 71 N.E.3d 167 (2017); In re Green, 101 Ohio App. 3d 726, 656 N.E.2d 705 (8th Dist. Cuyahoga County 1995); Taylor v. State, 2018 WL 6070307 (Tex. App. Houston 14th Dist. 2018).

3 State v. Darwin, 70 Wash. App. 875, 856 P.2d 401 (Div. 1 1993).
The function of bail is to ensure the defendant's appearance at trial court proceedings up to and including the disposition of the charges. Hendrix v. State, 615 N.E.2d 483 (Ind. Ct. App. 1993).

4 State v. Washington, 624 So. 2d 37 (La. Ct. App. 2d Cir. 1993).

5 Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997).

6 Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951); Larkins v. State, 622 N.E.2d 1299 (Ind. Ct. App. 1993).

7 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

8 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993); State v. Clark, 234 Iowa 338, 11 N.W.2d 722 (1943) (at least with regard to bailable offenses); Ex parte Green, 940 S.W.2d 799 (Tex. App. El Paso 1997).

9 U.S. v. Diaz, 811 F.2d 1412 (11th Cir. 1987).

10 Luster v. Broderick In and For Scott County, 327 N.W.2d 224 (Iowa 1982).

11 Luster v. Broderick In and For Scott County, 327 N.W.2d 224 (Iowa 1982).

12 State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635 (1943); Wallace v. State, 193 Tenn. 182, 245 S.W.2d 192, 29 A.L.R.2d 941 (1952).

13 U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

14 U.S. v. Velez, 693 F.2d 1081 (11th Cir. 1982); In re Forfeiture of Bail Bond, 209 Mich. App. 540, 531 N.W.2d 806 (1995); State v. Darwin, 70 Wash. App. 875, 856 P.2d 401 (Div. 1 1993).

15 Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997); State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996); In Interest of Reginald D., 193 Wis. 2d 299, 533 N.W.2d 181 (1995).
The purpose of a bail bond is not punitive. Addison v. Albany County, 2018 WY 148, 432 P.3d 513 (Wyo. 2018).
The court may not impose bail with the purposes of punishing the defendant. State v. Bailey, 204 Vt. 294, 2017 VT 18, 166 A.3d 608 (2017).

16 Luster v. Broderick In and For Scott County, 327 N.W.2d 224 (Iowa 1982).

17 State v. Darwin, 70 Wash. App. 875, 856 P.2d 401 (Div. 1 1993).

18 State v. Clark, 234 Iowa 338, 11 N.W.2d 722 (1943).

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I. In General

A. Overview

§ 3. Regulation of bail bond business

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West's Key Number Digest

West's Key Number Digest, Bail 60

A.L.R. Library

Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618

A statute regulating bail bond sureties is intended to protect the public interest by governing that business, including the licensing and regulation of persons who engage in it.[1] Those statutes or regulations have generally been upheld as valid.[2] It is a reasonable regulation under the police power to require that one who desires to conduct a bail bond business obtain a permit, and to provide that a permit may be denied to anyone who is not a fit and proper person.[3] A statute providing that any responsible person or firm may obtain a license to do business as a professional bondsman requires more than financial responsibility, but also moral qualifications, and the proper official has the authority, within the exercise of his or her sound discretion, to determine whether the applicant has the required qualifications.[4]

Courts have the inherent power to make reasonable rules for the regulation of the bail bond business.[5] Legislative authority is not exclusive, and does not preclude a court from promulgating additional rules governing and regulating bail bond sureties.[6] A court may impose reasonable limitations on the total liability of a surety's undertakings in that court and impose reasonable regulations regarding the making of bonds, and therefore has the full authority to determine who should be allowed to make bonds in its court.[7] A state department of insurance also has the power to discipline persons engaged in the bail bond business[8] and deny the renewal of their licenses.[9] A county sheriff may have the discretion to determine the acceptability of the sureties

who write bail bonds in the county.[10] The fact that the legislature has enacted statutes dealing with bail bond sureties and their regulation does not interfere with the inherent powers of regulation possessed by the court to act in addition to the statutes,[11] but courts do not have the power to waive or alter the statutory requirements for issuance of a bail bond license.[12] In light of statutes mandating approval by courts of bonds offered by commercial sureties authorized to do business in a state, a justice of the peace did not have discretion to refuse bonds tendered by a surety that was so authorized and that had complied in other respects with statutes regulating the bail bond business.[13]

The passage of a general licensing act regulating the bail bond business does not remove a court's power to suspend the right of a surety to write bonds in that court, even though the person is licensed by a state administrative agency.[14] However, a portion of a court order, which absolutely prohibited sureties on bail bonds to write bonds that exceeded the surety's net worth or line of credit was invalid, as the provision was too arbitrary because it deprived the judge of the necessary discretion in determining whether a surety can honor his or her obligations.[15]

The revocation or failure to renew the license of a bail surety falls within the requirements of due process,[16] and may not be based on confidential reports or secret matters not disclosed to the licensee; the licensee must have a hearing and disclosure, and the determination of the court is thereafter subject to review.[17]

Decisions of a bail bond licensing board are not subject to de novo review.[18]

Observation:

In some jurisdictions, the state is not required to show that the defendant received compensation for furnishing bail, to prosecute him or her for failure to procure a license.[19]

CUMULATIVE SUPPLEMENT

Cases:

Hold harmless clause in bail bond agreement, which required principal to defend, indemnify, and hold harmless the Surety and/or Bail Producer for any injuries, harm, losses, claims, lawsuits, damages, losses, liability, demands, actions, fees and expenses arising out of such activities, violated Montana statute that prohibited parties from exempting responsibility for their own fraud, willful injury to person or property of another, or for violation of law, whether willful or negligent, to extent that clause was used to insulate bail bond company from liability or payment for their negligent, willful, or fraudulent acts as it pertained to principal, since clause indemnified bail bond company from any harms including unintentional and non-negligently caused harms. Mont. Code Ann. § 28-2-702. Mitchell v. First Call Bail and Surety, Inc., 425 F. Supp. 3d 1256 (D. Mont. 2019).

Commissioner of Indiana Department of Insurance's interpretation that violence was an element of class A misdemeanor battery was reasonable, thus supporting revocation of bail-agent license, under statute which defined disqualifying offenses to include misdemeanors if an element of the offense involved violence, of bail agent who was convicted of class A misdemeanor battery

of his grandson; violence was generally defined as use of physical force with the intent to harm, and class A misdemeanor battery required that the physical contact result in bodily injury which included physical pain. Ind. Code Ann. §§ 27-10-1-6, 27-10-3-8(d), 35-42-2-1. Commissioner, Indiana Department of Insurance v. A.P., 121 N.E.3d 548 (Ind. Ct. App. 2018), transfer denied, 111 N.E.3d 197 (Ind. 2018).

Defendants who agreed to indemnify professional bondsman on bail bonds for their employee were not sureties on the bonds, and thus did not act lawfully when they searched for, chased, apprehended, and handcuffed employee who had violated the terms of his probation; defendants were liable only to the bondsman and not to the state. N.C. Gen. Stat. Ann. § 15A-531. State v. Gettleman, 853 S.E.2d 447 (N.C. Ct. App. 2020).

Surety bond agent's violation of administrative rule prohibiting the stacking of bonds did not render surety bond void, under statute providing that a bond would continue pending sentence or disposition of defendant's case on review; there was no evidence that trial court required surety to act in contradiction to any rule applicable to its license, and statute did not prohibit stacking of bonds. Ohio Crim. R. 46(H); Ohio Admin. Code 3901-1-66. State v. Guzman, 2020-Ohio-539, 152 N.E.3d 412 (Ohio Ct. App. 3d Dist. Allen County 2020).

[END OF SUPPLEMENT]

Footnotes

1 Villanueva v. Gonzalez, 123 S.W.3d 461 (Tex. App. San Antonio 2003).

2 Allen v. Pavach, 263 Ind. 574, 335 N.E.2d 219 (1975) (upholding statute in the face of various equal protection challenges); City of Paducah v. Johnson Bonding Co., Inc., 512 S.W.2d 481 (Ky. 1974) (holding that an ordinance setting rates, requiring certain disclosures to clients, and otherwise regulating the bail bond business was valid); In re Preclusion of Brice, 366 N.J. Super. 519, 841 A.2d 927 (App. Div. 2004) (delisting of the agent for several surety companies, who had not paid a bail forfeiture judgment, does not violate substantive due process, given that the agent signed the bond, personally binding himself to paying the judgment, even though an agent is usually not liable for the principal's default); Regan v. State Dept. of Licensing, 130 Wash. App. 39, 121 P.3d 731 (Div. 2 2005) (definition of "bail bond agent" not vague).
The Eighth Amendment's prohibition of excessive bail did not apply to state statutes imposing bail fees to cover the costs of the bail bond system. Broussard v. Parish of Orleans, 318 F.3d 644 (5th Cir. 2003).

3 Summit Fidelity & Sur. Co. of Akron, Ohio v. Nimtz, 158 Neb. 762, 64 N.W.2d 803 (1954); Doe v. O'Brien, 107 N.H. 79, 217 A.2d 189 (1966).

4 Department of Ins. v. Hendrickson, 245 Ind. 117, 196 N.E.2d 574, 13 A.L.R.3d 608 (1964).
Lack of prior convictions does not necessarily equate to "good moral character," within meaning of statute requiring that a professional bail bondsperson have good moral character and not been convicted of a felony or any crime involving moral turpitude. Pryor Organization, Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).
The offense of issuance of a bad check was not a crime involving moral turpitude so as to disqualify an applicant convicted of that crime on three separate occasions from holding a bail bond license. Dallas County Bail Bond Bd. v. Mason, 773 S.W.2d 586 (Tex. App. Dallas 1989).

5 Concord Casualty & Surety Co. v. U.S., 69 F.2d 78, 91 A.L.R. 885 (C.C.A. 2d Cir. 1934).

6 In re Johnson, 26 N.C. App. 745, 217 S.E.2d 85 (1975); In re International Fidelity Ins. Co., 989 S.W.2d 726 (Tenn. Crim. App. 1998) (with regard to posting an additional deposit with the court).
A supreme court order which set forth the job description, powers, and duties of an administrative district judge, and granted all administrative district judges "administrative supervision and authority" to "establish guidelines for bail bonds with regard to posting, forfeiture, exoneration and all other matters," granted administrative district judges the right to issue procedural rules regarding bail agents, and did not grant

authority to issue substantive rules regarding bail agents. Two Jinn, Inc. v. District Court of the Fourth Judicial Dist., 150 Idaho 647, 249 P.3d 840 (2011).

7 In re Hitt, 910 S.W.2d 900 (Tenn. Crim. App. 1995).

8 Moncrief v. State, Com'r of Ins., 415 So. 2d 785 (Fla. 1st DCA 1982); Davis-Everett v. Dale, 926 So. 2d 279 (Miss. Ct. App. 2006); In re Palmer, 171 Vt. 464, 769 A.2d 623 (2000).

9 Ficarra v. Department of Regulatory Agencies, Div. of Ins., 849 P.2d 6 (Colo. 1993).

10 Pryor Organization, Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).

11 Miller v. Pulaski County Circuit Court, 284 Ark. 55, 679 S.W.2d 187 (1984) (statutes recognizing the power of judges to regulate the business of bail bond sureties and providing that the Department of Insurance has the authority to administer licensing requirements do not conflict); In re Hitt, 910 S.W.2d 900 (Tenn. Crim. App. 1995).

12 International Fidelity Ins. Co. v. Wise County Bail Bond Bd., 83 S.W.3d 257 (Tex. App. Fort Worth 2002).

13 Wilshire Ins. Co. v. Carrington, 570 P.2d 301 (Mont. 1977).

14 Taylor v. Waddey, 206 Tenn. 497, 334 S.W.2d 733 (1960).

15 Miller v. Pulaski County Circuit Court, 284 Ark. 55, 679 S.W.2d 187 (1984).
As to the sufficiency of sureties as a requirement of a bail bond, generally, see § 76.

16 In re Carter, 192 F.2d 15 (D.C. Cir. 1951); State ex rel. Weaver v. Dostert, 171 W. Va. 461, 300 S.E.2d 102 (1983) (courts will infer that procedures comporting with constitutional due process safeguards are required).

17 In re Carter, 192 F.2d 15 (D.C. Cir. 1951).

18 Tomerlin v. Nickolich, 342 Ark. 325, 27 S.W.3d 746 (2000) (finding a statute providing for de novo review unconstitutional, as violating the separation of powers doctrine).

19 State v. Fiasconaro, 25 Conn. App. 643, 595 A.2d 945 (1991).

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A. Overview

§ 4. Regulation of bail bond business—Abolition

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West's Key Number Digest

West's Key Number Digest, Bail 60

A.L.R. Library

Validity of statute abolishing commercial bail bond business, 19 A.L.R.4th 355

Statutes expressly abolishing the commercial bail bonding business and making it unlawful for one to act as a compensated surety in posting bonds to secure the appearance of a criminal defendant have been deemed to be constitutional, as within a state's police power.[1] Such a statute does not violate the Eighth Amendment prohibition against excessive bail, nor deny people in that business of liberty or property without due process of law.[2] The contention that the abolition of the commercial bail bonding business is an unconstitutional impairment of contract has been rejected, where the statute in question had prospective effect, and since freedom of contract must give way to the valid exercise of the police power.[3] A statute that abolished a commercial bail bond system in a state, substituting for it a state system for the furnishing of bail bonds and making it unlawful for anyone other than those authorized by the statute to furnish bail bonds or property as a bond, was also not a bill of attainder.[4]

Statutes having the effect of abolishing the commercial bail bonding business by providing an alternative, less expensive, cash deposit plan have also been held valid.[5]

Footnotes

1 Stephens v. Bonding Ass'n of Kentucky, 538 S.W.2d 580 (Ky. 1976); Kahn v. McCormack, 99 Wis. 2d 382, 299 N.W.2d 279, 19 A.L.R.4th 346 (Ct. App. 1980).

2 Johnson Bonding Co., Inc. v. Com. of Ky., 420 F. Supp. 331 (E.D. Ky. 1976).

3 Johnson Bonding Co., Inc. v. Com. of Ky., 420 F. Supp. 331 (E.D. Ky. 1976).

4 Benboe v. Carroll, 625 F.2d 737 (6th Cir. 1980).

5 Schilb v. Kuebel, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).
As to the constitutionality of provisions allowing only cash deposits, see § 83.

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B. Authority or Duties of Particular Courts or Persons to Grant Bail

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

1. In General

§ 5. Authority or duty of trial or appellate courts to grant bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 46.1, 47

Fixing of bail is usually left to the trial judge,[1] as the initial resolution of applications for release pending appeal has traditionally been committed to trial courts.[2] In this regard, ordinarily, by statute an application to be admitted to bail should be initiated in the trial court in which the matter is pending, to the exclusion of appellate or other courts.[3] Ordinarily, an appellate judge will decline to act in the first instance, except in the case of the trial judge's absence, disqualification, or inability or refusal to act.[4] However, the rule has been followed in some states that the application for bail in the first instance must be made to the court that has custody of the person of the applicant at the time the application is made.[5] Furthermore, rules and statutes sometimes provide that, except in specified cases, either the trial courts or the appellate courts, or a justice of the appellate court, may admit a convicted person to bail pending appeal.[6]

Generally, when the matter is before an appellate court, either the entire court or the individual judges of the court may admit to bail.[7] In the federal system, the court of appeals or one of its judges may order the release of the defendant pending the decision of the appeal,[8] and the decision regarding release must be made in accordance with applicable provisions of the Bail Reform Act.[9]

Observation:

A trial court has the authority to order a refund of some or all of the premium payment made to the surety as a result of its erroneous grant of bail, where there is no statutory restriction on the authority of trial courts in conducting criminal proceedings to consider the question of refunding premium payments made as a result of a ruling found erroneous as a matter of law.[10]

Footnotes

1 State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985).
The trial court has the authority to make bail bond decisions, subject to limitations imposed by statute. People v. Rickman, 178 P.3d 1202 (Colo. 2008).
The trial court is responsible for setting and modifying bail and releasing a defendant on his or her own recognizance. People v. Campa, 217 Ill. 2d 243, 298 Ill. Dec. 722, 840 N.E.2d 1157 (2005).
The determination whether to grant bail and what form the bond should take in a particular case is within the trial court's discretion. Smith v. City of Hammond, 848 N.E.2d 333 (Ind. Ct. App. 2006).

2 U.S. v. Krzyske, 857 F.2d 1089 (6th Cir. 1988); Meekins v. State, 31 Ark. App. 70, 787 S.W.2d 258 (1990); Lofton v. U.S., 926 A.2d 1104 (D.C. 2007); State v. Maples, 445 So. 2d 540 (Miss. 1984) (before presentation to the state supreme court); State v. Groves, 2018-NMSC-006, 410 P.3d 193 (N.M. 2018).
Trial courts have at their disposal the tools of bail and conditional release. Morrison v. State, 2012 WY 41, 272 P.3d 321 (Wyo. 2012).

3 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993); State ex rel. Smith v. Marion Circuit Court, 230 Ind. 21, 101 N.E.2d 272 (1951).
A district court has exclusive pretrial detention authority as a statutory court of record. State v. Groves, 2018-NMSC-006, 410 P.3d 193 (N.M. 2018).

4 Hicks v. State, 179 Tenn. 601, 168 S.W.2d 781 (1943); State v. Bouchelle, 134 W. Va. 34, 61 S.E.2d 232 (1949); State v. Helton, 72 Wyo. 105, 261 P.2d 46 (1953).

5 State v. Bouchelle, 134 W. Va. 34, 61 S.E.2d 232 (1949).

6 Tyson v. State, 593 N.E.2d 175 (Ind. 1992) (rules of appellate procedure providing two avenues for seeking bail pending appeal were adequate; observing that it would be unconstitutional to repose in the trial court the exclusive power to determine whether a petitioner should be allowed bail pending appeal); State v. Maples, 445 So. 2d 540 (Miss. 1984) (statute provided for concurrent jurisdiction); State v. Helton, 72 Wyo. 105, 261 P.2d 46 (1953).

7 State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948).

8 Fed. R. App. P. 9(a)(3).

9 Fed. R. App. P. 9(c).

10 Yording v. Walker, 683 P.2d 788 (Colo. 1984).

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

1. In General

§ 6. Authority or duty of magistrates, justices of the peace, and bail commissioners to grant bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 47, 48

When conducting preliminary hearings, magistrates have the power, on adjournment, to demand security for appearances at a future date.[1] A magistrate has the discretion to determine whether, and the conditions under which, a defendant will be held in custody while charges are pending.[2] The bond taken by the magistrate may cover the appearance of the defendant in the trial court as well as at the preliminary hearing.[3] However, once the defendant is bound over to the trial court, the magistrate loses jurisdiction of the defendant's person, and thereafter may not make any ruling concerning bail.[4]

The power of a magistrate to set bail may be authorized by statute.[5] Under some of those provisions, judges of the criminal court and magistrate sections and magistrate commissioners share jurisdiction with regard to bail.[6] Magistrates and justices of the peace also have authority, under a federal statute, to release an offender for any offense against the United States before trial.[7]

Observation:

A state's bail magistrate system has been said to be designed to provide rapid out-of-court bail hearings and inject quasi-judicial officers into the criminal process at a very early stage.[8]

A state magistrate judge who did not act in clear absence of jurisdiction in setting bail is entitled to absolute immunity where acting in a judicial capacity.[9]

Footnotes

1 Petition of McNair, 324 Pa. 48, 187 A. 498, 106 A.L.R. 1373 (1936).

2 State v. Pacheco-Ortega, 2011 UT App 186, 257 P.3d 498 (Utah Ct. App. 2011).

3 State v. Stanton, 59 Ariz. 55, 122 P.2d 855 (1942).

4 State ex rel. Macko v. Westropp, 88 Ohio App. 104, 44 Ohio Op. 37, 57 Ohio L. Abs. 185, 93 N.E.2d 604 (8th Dist. Cuyahoga County 1950).

5 State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996) (bail to be set by the court or a magistrate).

6 State v. Neisler, 633 So. 2d 1224 (La. 1994).

7 § 9.

8 Com. v. Finelli, 422 Mass. 860, 666 N.E.2d 144 (1996).

9 L.B. v. Town of Chester, 232 F. Supp. 2d 227 (S.D. N.Y. 2002).

8A Am. Jur. 2d Bail and Recognizance § 7

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Bail and Recognizance

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

1. In General

§ 7. Authority or duty of administrative and ministerial officer to grant bails; court clerks; jail custodians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 48

The general rule is that purely ministerial officers do not have the inherent power to allow bail.[1] However, a court clerk may take or allow bail in criminal cases if there is a statute conferring that power.[2] A pretrial services program may have some authority with respect to bail, and may be required to impose a statutory condition, such as that the defendant is prohibited from committing a felony while at liberty on bail, but exceeds its statutory authority by imposing other conditions not authorized by statute, since that is a judicial function, which a court may not delegate.[3]

An administrative order issued by a presiding judge, authorizing the court clerk or the clerk's deputies to sign orders of release of county prisoners, in lieu of the signature of a judge, was inconsistent with a statute reflecting the legislative intent that a judge or magistrate undertake the responsibility of signing orders releasing prisoners, and, thus, was unenforceable.[4]

The fixing of bail is not a matter for a State Board of Probation and Parole.[5]

Footnotes

1 State v. Filon, 134 N.J.L. 113, 46 A.2d 61 (N.J. Sup. Ct. 1946).

2 State v. Bowser, 232 N.C. 414, 61 S.E.2d 98 (1950).
An assistant clerk was a "judicial official" who could not set bail, if doing so would effectively vacate another court's revocation of bail. Com. v. Hall, 445 Mass. 1016, 837 N.E.2d 267 (2005).

3 People v. Rickman, 178 P.3d 1202 (Colo. 2008).

4 Petuskey v. Freeman, 1995 OK 9, 890 P.2d 948 (Okla. 1995).

5 Gaito v. Com., Pennsylvania Bd. of Probation and Parole, 128 Pa. Commw. 253, 563 A.2d 545 (1989).

End of Document

8A Am. Jur. 2d Bail and Recognizance § 8

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Bail and Recognizance

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

1. In General

§ 8. Authority or duty of sheriffs and police officers to grant bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 48

In the absence of statutory authorization, neither a sheriff[1] nor a police officer[2] has authority to grant bail. Furthermore, an arresting officer does not have the inherent authority to fix the amount of bail.[3] However, statutes have sometimes provided for the allowance of bail by a sheriff in misdemeanor cases.[4] Where a state rule permitted the delegation of bail authority to the officer in charge of the police station house, but a city preferred to leave that function to the municipal court, with provision for 24-hour availability of judges, the city's failure to adopt the state rule did not amount to an unconstitutional policy.[5] Also, a trial court's delegation to a county community corrections program of the ultimate authority to determine whether a defendant is released on personal recognizance bail has been upheld as against the contention that it violates the separation of powers doctrine.[6]

The fact that an arrest is made far from the scene of the alleged crime, and in a county where the courts do not have jurisdiction to admit the arrested party to bail, is not generally sufficient for the sheriff to set the amount and take a bail bond in a felony matter; the sheriff should return the prisoner to the county where the courts have jurisdiction of the offense and have bail fixed by its judicial officers.[7]

Footnotes

1 Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947); Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745 (1947) (not a conservator of the peace to determine whether a particular case is bailable).

2 Trevathan v. Mutual Life Ins. Co. of New York, 166 Or. 515, 113 P.2d 621 (1941).

Although it is illegal for a member of the police department to fix bail, this is not such an invasion of the defendant's rights as to require reversal, where the bail was nominal and did not impede eventually obtaining bail. State v. Filon, 134 N.J.L. 113, 46 A.2d 61 (N.J. Sup. Ct. 1946).

3 § 86.

4 Wilson v. State, 167 Ga. App. 421, 306 S.E.2d 704 (1983); Pelekai v. White, 75 Haw. 357, 861 P.2d 1205 (1993).

5 Talbert v. Kelly, 799 F.2d 62 (3d Cir. 1986).

6 Fischer v. Superintendent, Strafford County House of Corrections, 163 N.H. 515, 44 A.3d 493 (2012).

7 Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

End of Document

8A Am. Jur. 2d Bail and Recognizance § 9

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

2. Federal Offenses

§ 9. Authority or duty of federal judicial officer to grant bail, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 46

A federal statute provides that, for any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided by the Bail Reform Act,[1] as the case may be, for trial before such court of the United States as by law has cognizance of the offense.[2] A United States judge or magistrate must proceed under this provision according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting under the provision may proceed according to the usual mode of procedure of his or her state, but the acts and orders of the judge or magistrate do not have effect beyond determining, pursuant to the Bail Reform Act,[3] whether to detain or conditionally release the prisoner prior to trial or to discharge the prisoner from arrest.[4] Furthermore, a judicial officer authorized to order the arrest of a person, under the provision described above, before whom an arrested person is brought, must order that the person be released or detained, pending judicial proceedings, under the Bail Reform Act.[5] One released on bail under the applicable federal statutes[6] is under the continuing jurisdiction of the district court that admitted that person to bail.[7]

A federal circuit judge or the Supreme Court itself may decide motions for release from custody by defendants or appellants pending the disposition of appeals or of petitions for certiorari.[8] Requests for bail to the Supreme Court are granted only in extraordinary circumstances, especially if a previous bail application has been denied, and applicants must also demonstrate a reasonable possibility that four members of the Supreme Court will vote to grant the petition for certiorari.[9]

A federal appellate court's jurisdiction over prejudgment bail matters is appellate, not original.[10] On the other hand, a judicial officer[11] of a court of original jurisdiction over an offense, or a judicial officer of a federal appellate court, must order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under the Bail Reform Act.[12]

The Bail Reform Act only applies to persons accused of committing an offense against the United States, and not to international extradition cases.[13]

Footnotes

1 18 U.S.C.A. §§ 3141 to 3156.

2 18 U.S.C.A. § 3041.
District of Columbia superior court judges are authorized to act as federal magistrates for purposes of releasing federal defendants under the Bail Reform Act. U.S. v. Stewart, 104 F.3d 1377, 46 Fed. R. Evid. Serv. 300 (D.C. Cir. 1997).

3 18 U.S.C.A. § 3142.

4 18 U.S.C.A. § 3041.

5 18 U.S.C.A. § 3141(a) (referring to the provisions of 18 U.S.C.A. §§ 3141 to 3156).

6 18 U.S.C.A. §§ 3141 to 3156.

7 U.S. v. Roche, 611 F.2d 1180, 52 A.L.R. Fed. 894 (6th Cir. 1980).

8 U.S. v. Krzyske, 857 F.2d 1089 (6th Cir. 1988).
As to an application to individual Circuit Justice or United States Supreme Court Justice for bail pending appeal of conviction or disposition of a petition for certiorari, see Am. Jur. 2d, Appellate Review § 461.

9 McGee v. Alaska, 463 U.S. 1339, 104 S. Ct. 16, 77 L. Ed. 2d 1440 (1983); Julian v. U.S., 463 U.S. 1308, 103 S. Ct. 3522, 77 L. Ed. 2d 1290 (1983).

10 U.S. v. Kolek, 728 F.2d 1280 (9th Cir. 1984), holding, therefore, that a federal appellate court lacked jurisdiction over a defendant's request for a reduction of bail pending trial.

11 As to the definition of "judicial officer," for this purpose, see § 14.

12 18 U.S.C.A. § 3141(b) (referring to provisions of 18 U.S.C.A. §§ 3141 to 3156).

13 Matter of Extradition of Sutton, 898 F. Supp. 691 (E.D. Mo. 1995).

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8A Am. Jur. 2d Bail and Recognizance § 10

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I. In General

B. Authority or Duties of Particular Courts or Persons to Grant Bail

2. Federal Offenses

§ 10. Power to grant bail pending federal habeas corpus proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 46.1, 47

A federal district court has the power to release a convicted state prisoner on bail pending the outcome of a federal habeas corpus proceeding, because that power is inherent in the nature of that proceeding.[1] However, it is not a part of the federal court's function to allow bail in a federal habeas review of state proceedings simply because the state does not object.[2]

CUMULATIVE SUPPLEMENT

Cases:

Immigration detainees whose age or health conditions placed them at high risk for serious illness or death from exposure to COVID-19 were likely to succeed on merits of their claim that detention facility officials were deliberately indifferent to their health and safety, in violation of Due Process Clause, and thus were entitled to bail hearings pending adjudication of their habeas petition, even though officials had taken measures to reduce risk of COVID-19's introduction and transmission, where officials did not identify any high-risk detainees until forced to do so by lawsuit and gave hypertension no weight in high-risk analysis, and there was no evidence that facility had implemented additional measures to protect high-risk detainees. U.S. Const. Amend. 5; 28 U.S.C.A. § 2241. Gomes v. US Department of Homeland Security, Acting Secretary, 460 F. Supp. 3d 132, 2020 DNH 81 (D.N.H. 2020).

Extraordinary circumstances created by COVID-19 justified releasing immigration detainees from detention on bail, and made bail necessary, to make the habeas remedy effective; detainees were vulnerable to severe complications and death if they were to contract COVID-19 and were incarcerated in facilities at the epicenter of the outbreak where they could not practically adhere to social distancing guidelines or the adequate level of personal hygiene to stop the spread of the virus, and the circumstances

in the immigration court rendered the bond hearing, which detainees requested in the alternative, an insufficient remedy, as bond hearings were unlikely to occur due to COVID-19. 28 U.S.C.A. § 2241. Cristian A.R. v. Decker, 453 F. Supp. 3d 670 (D.N.J. 2020).

District courts' inherent power to release habeas petitioners on bail if they demonstrate a substantial question of constitutional error and exceptional circumstances even applies to immigration detainees. Yanes v. Martin, 464 F. Supp. 3d 467 (D.R.I. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Pethtel v. Attorney General of Indiana, 704 F. Supp. 166 (N.D. Ind. 1989).
As to the right to bail pending habeas corpus proceedings, generally, see § 23.

2 McGee v. Alaska, 463 U.S. 1339, 104 S. Ct. 16, 77 L. Ed. 2d 1440 (1983).

End of Document

8A Am. Jur. 2d Bail and Recognizance II A Refs.

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 40, 42, 49(3.1)

A.L.R. Library

A.L.R. Index, Bail and Recognizance
A.L.R. Index, Federal Bail Reform Act
West's A.L.R. Digest, Bail 40, 42, 49(3.1)

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8A Am. Jur. 2d Bail and Recognizance § 11

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

§ 11. Right or authority to enter into bail or recognizance, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

The right to freedom by bail pending trial is interrelated to the doctrine that one accused is presumed innocent until proven guilty beyond a reasonable doubt.[1] While the right of an accused to freedom pending trial is inherent in the concept of a liberty interest protected by the Due Process Clause of the 14th Amendment, the states are free to deny bail completely in appropriate cases.[2] Although the Eighth Amendment prohibits excessive bail,[3] it does not grant an unqualified right to bail in any particular case.[4]

CUMULATIVE SUPPLEMENT

Statutes:

The Uniform Pretrial Release and Detention Act §§ 1 et seq., adopted July 15, 2020, addresses: (1) the use of citations in lieu of arrest for minor offenses; (2) a time limit on when a hearing must be conducted for an individual who is arrested; (3) appointment of counsel; (4) a pretrial risk determination by a court to individualize release or detention; (5) review of a defendant's financial condition so that inability to pay a fee does not lead to detention; and (6) an obligation on the court to consider restrictive conditional release as an alternative to detention.

[END OF SUPPLEMENT]

Footnotes

1 Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997).

The right to bail is consonant with the presumption of innocence that attaches to all defendants prior to conviction. Application of Knast, 96 Nev. 597, 614 P.2d 2 (1980).

The options of personal recognizance without surety, release with conditions, or detention of a defendant who is charged with certain serious offenses involving physical force against another person represent increasingly graduated levels of restraint and, given that the defendant is presumed innocent, allow a judge to tailor an order to impose the least restrictive measures necessary to ensure the defendant's appearance at future proceedings and to safeguard members of the community. Com. v. Madden, 458 Mass. 607, 939 N.E.2d 778 (2010).

2 Meechaicum v. Fountain, 696 F.2d 790 (10th Cir. 1983).

3 § 87.

4 Rocco v. State, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

The Excessive Bail Clause of the Eighth Amendment does not bar a state from detaining even noncapital arrestees without bail, or from considering interests other than flight prevention in setting bail. Galen v. County of Los Angeles, 477 F.3d 652 (9th Cir. 2007).

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8A Am. Jur. 2d Bail and Recognizance § 12

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

§ 12. State provisions governing right or authority to enter into bail or recognizance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A.L.R. Library

Pretrial preventive detention by state court, 75 A.L.R.3d 956

Many states have generally guaranteed, by constitutional[1] or statutory[2] provisions, and as implemented by court rules,[3] that all persons charged with a crime shall be bailable, by sufficient sureties,[4] except in particular cases.[5] Some of these provisions require that liberty be the norm and detention prior to trial the carefully limited exception, for "special circumstances" where the state's interest is "legitimate and compelling."[6]

Constitutional prohibitions against excessive bail do not accord a right to bail.[7] Thus, in providing a constitutional right to bail, a state constitution affords a greater right than that provided by the U.S. Constitution.[8]

A constitutional right to bail neither depends on, nor may be limited by a state statute or court rule.[9] Similarly, where a state rule of criminal procedure specified the method of seeking release on bail, including regarding the surety bond, a local court's administrative order that prohibited a clerk's acceptance of a surety bond for bail purposes in a misdemeanor case was in direct contravention of the dictates of the rule.[10]

A state constitutional provision providing, in part, that all persons shall be bailable, with specified exceptions, has been construed as conferring a right to bail only prior to trial, and not following conviction during a pending appeal.[11] However, there is no requirement that an individual be charged with a crime to be entitled to bail.[12]

Statutes in some states provide that a felony defendant must be released on bond or recognizance if the state is not ready for trial within a specified period from the commencement of the detention.[13] Under some rules of criminal procedure, if a motion to dismiss is sustained, the court may order that the defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment or information, and if a new information is not filed, the rule clearly requires that the defendant be discharged from custody.[14]

CUMULATIVE SUPPLEMENT

Cases:

In order to determine whether bail is necessary, the district court should consider first whether, given the individual circumstances of the defendant, including his or her character and ties to the community, his or her criminal history, and the nature of and potential sentence for the alleged offenses, release on personal recognizance or subject to nonmonetary conditions would be sufficient to reasonably ensure the purposes of bail are met; if so, then no bail should be set, as any amount of bail would be excessive. Nev. Const. art. 1, §§ 6, 7; Nev. Rev. St. § 178.4853. Valdez-Jimenez v. Eighth Judicial District Court in and for County of Clark, 460 P.3d 976, 136 Nev. Adv. Op. No. 20 (Nev. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (2016); Yording v. Walker, 683 P.2d 788 (Colo. 1984); State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995); Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997); Jones v. State, 798 So. 2d 1241 (Miss. 2001); Lopez-Matias v. State, 504 S.W.3d 716 (Mo. 2016); State v. Steele, 430 N.J. Super. 24, 61 A.3d 174 (App. Div. 2013); State ex rel. Sylvester v. Neal, 140 Ohio St. 3d 47, 2014-Ohio-2926, 14 N.E.3d 1024 (2014); State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994); State v. Kastanis, 848 P.2d 673 (Utah 1993); State v. Hance, 180 Vt. 357, 2006 VT 97, 910 A.2d 874 (2006); State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993); Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

2 Com. v. Finelli, 422 Mass. 860, 666 N.E.2d 144 (1996); State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

3 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).

4 § 76.

5 Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996); Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006) (sexually violent offenders); Com. v. Finelli, 422 Mass. 860, 666 N.E.2d 144 (1996); State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832 (2006); Pharris v. State, 165 S.W.3d 681 (Tex. Crim. App. 2005) (construing a "no bond" provision in the state constitution); State v. Avgoustov, 180 Vt. 595, 2006 VT 90, 907 A.2d 1185 (2006).
As to capital cases, see § 29.

6 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004); Blackson v. U.S., 897 A.2d 187 (D.C. 2006); Wheeler v. State, 160 Md. App. 566, 864 A.2d 1058 (2005); State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993).

7 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004); Rocco v. State, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

8 Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997).
As to the scope of the Eighth Amendment, see § 87.

9 In re Conard, 944 S.W.2d 191 (Mo. 1997).

10 State ex rel. Henneke v. Davis, 25 Ohio St. 3d 23, 494 N.E.2d 1133 (1986).

11 State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985).
As to bail after conviction or pending appeal, generally, see §§ 18 to 25.

12 In re Conard, 944 S.W.2d 191 (Mo. 1997).

13 Bryant v. Vowell, 282 Ga. 437, 651 S.E.2d 77 (2007) (overruled on other grounds by, Brown v. Crawford, 289 Ga. 722, 715 S.E.2d 132, 85 A.L.R.6th 699 (2011)); People ex rel. Chakwin on Behalf of Ford v. Warden, New York City Correctional Facility, Rikers Island, 63 N.Y.2d 120, 480 N.Y.S.2d 719, 470 N.E.2d 146 (1984); Com. v. Jones, 2006 PA Super 103, 899 A.2d 353 (2006) (except where defendant's appearance could not be assured by conditions other than detention); Ex parte Venegas, 116 S.W.3d 160 (Tex. App. San Antonio 2003).

14 Fontana v. Rice, 644 So. 2d 502 (Fla. 1994).

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8A Am. Jur. 2d Bail and Recognizance § 13

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

§ 13. State provisions governing right or authority to enter into bail or recognizance—Absolute or discretionary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A provision of a state constitution providing in part that all persons shall be bailable by sufficient sureties in noncapital cases, and similar provisions, have been construed as guaranteeing an accused an absolute right to bail in such a case.[1] Where a constitution guarantees the right to bail, except in capital cases,[2] one accused of a noncapital offense may not be denied bail because of a failure to appear at the time and in the manner required by the bail bond,[3] although the court may set bail at a higher figure because of the accused's prior default.[4] However, it has also been said that the fundamental right to bail guaranteed under a state constitution must be qualified by a court's authority to ensure compliance with the conditions of release.[5] Even so, a noncapital defendant's absolute right to bail may only be curbed by setting certain conditions on release, and not its complete denial.[6]

Some bail statutes were not intended to give the courts discretion to deny bail, but to establish the accused's right, in most circumstances, to be admitted to bail.[7]

A constitutional provision prohibiting excessive bail does not itself take away the court's sound discretion to determine whether one should be admitted to bail,[8] and thus there is not an absolute constitutional right to bail, although a defendant always has the right to seek release on recognizance or bail, and public policy favors release pending the determination of guilt or innocence.[9]

Footnotes

1 State v. Blake, 642 So. 2d 959 (Ala. 1994); Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); Drexler v. State, 2018 Ark. App. 95, 538 S.W.3d 888 (2018); State v. Ayala, 222 Conn. 331, 610 A.2d 1162

(1992); Lopez-Matias v. State, 504 S.W.3d 716 (Mo. 2016); State ex rel. Jones v. Hendon, 66 Ohio St. 3d 115, 609 N.E.2d 541 (1993); State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993) (defendants not charged with offenses punishable by death or life imprisonment).

2 § 29.

3 Palmer v. District Court of City and County of Denver, Second Judicial Dist., 156 Colo. 284, 398 P.2d 435, 11 A.L.R.3d 1380 (1965); Wallace v. State, 193 Tenn. 182, 245 S.W.2d 192, 29 A.L.R.2d 941 (1952).

4 §§ 89, 91.

5 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992).

As to conditions of release, generally, see §§ 42 to 45.

6 Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996).

7 Paquette v. Com., 440 Mass. 121, 795 N.E.2d 521 (2003).

8 People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947).

9 People v. Mohammed, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).

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8A Am. Jur. 2d Bail and Recognizance § 14

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

§ 14. Federal statutes and rules governing right or authority to enter into bail or recognizance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

Forms

Forms relating to bail in Federal court, generally, see Am. Jur. Pleading and Practice Forms, Federal Criminal Procedure; Federal Procedural Forms, Criminal Procedure [Westlaw®(r) Search Query]

The Bail Reform Act of 1984 specifically deals with release and detention pending judicial proceedings.[1] The Act does not violate the Excessive Bail Clause of the Eighth Amendment, or the Due Process Clause of the Fifth Amendment.[2]

On appearance before a judicial officer[3] of a person charged with an offense, the judicial officer is required to issue an order that, pending trial, the person be released on personal recognizance or on execution of an unsecured appearance bond;[4] released on a statutory condition or combination of such conditions;[5] temporarily detained to permit revocation of conditional release, deportation, or exclusion;[6] or detained if, after a hearing,[7] the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.[8]

It has been said that only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor.[9] However, an accused may be detained pending completion of a pretrial detention hearing.[10]

The Federal Rules of Criminal Procedure provide that eligibility for release prior to trial is in accordance with the applicable statutes.[11]

A judicial officer may, by an order subsequent to a detention or release hearing, permit the temporary release of a person in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines that the release is necessary for preparation of the person's defense or for another compelling reason.[12]

The provisions of the Bail Reform Act apply to a criminal case removed to a federal court from a state court.[13]

Footnotes

1 18 U.S.C.A. §§ 3141 to 3156.

2 U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

3 The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to 18 U.S.C.A. § 3041 (discussed in § 9), or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia. 18 U.S.C.A. § 3156(a)(1).

4 § 15.

5 18 U.S.C.A. § 3142(a)(2).

6 18 U.S.C.A. § 3142(a)(3).
Federal district courts are required to exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating unnecessary detention. Fed. R. Crim. P. 46(h)(1).
As to revocation of bail, generally, see §§ 121, 122.

7 § 52.

8 § 32.

9 U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).

10 18 U.S.C.A. § 3142(f).

11 Fed. R. Crim. P. 46(a), referring to 18 U.S.C.A. §§ 3142, 3144.

12 18 U.S.C.A. § 3142(i).

13 18 U.S.C.A. § 3150.

8A Am. Jur. 2d Bail and Recognizance § 15

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II. Right or Authority to Enter into Bail or Recognizance

A. Overview

§ 15. Release on personal recognizance or unsecured bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 40

A.L.R. Library

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780

Forms

Forms relating to personal recognizance or unsecured bond, generally, see Federal Procedural Forms, Criminal Procedure [Westlaw®(r) Search Query]

It has been said a system of bail based totally on some form of monetary bail, and not providing for release on personal recognizance in appropriate circumstances, would be unconstitutional;[1] therefore an accused may not be denied release from detention because of indigence[2] and is constitutionally entitled to be released on personal recognizance where other relevant factors make it reasonable to believe that the defendant will comply with court orders.[3]

The preferred disposition under a bail statute may be release on personal recognizance.[4] Furthermore, a defendant may, under the applicable rules of criminal procedure of some states, be released on personal recognizance in an appropriate case.[5]

Under the federal statute, at the appearance before a judicial officer of a person charged with an offense, the judicial officer may issue an order that, pending trial, the person be released on personal recognizance or on execution of an unsecured appearance bond,[6] subject to the certain specified conditions.[7]

Some state bail statutes or rules provide for the release of an accused on personal recognizance[8] or on the execution of an unsecured appearance bond,[9] unless it appears that it will not reasonably assure the accused's appearance at trial,[10] or will threaten public safety.[11] A state statute providing for the release of an indigent person on his or her own recognizance, without bond, has been construed to be directory, rather than mandatory.[12]

Footnotes

1 State v. Blake, 642 So. 2d 959 (Ala. 1994); Lee v. Lawson, 375 So. 2d 1019 (Miss. 1979).

2 § 30.

3 Bandy v. U.S., 82 S. Ct. 11, 7 L. Ed. 2d 9 (1961).

4 Paquette v. Com., 440 Mass. 121, 795 N.E.2d 521 (2003).
The pretrial release rule prioritizes release on own recognizance over release with conditions. Bradds v. Randolph, 239 Md. App. 50, 194 A.3d 444 (2018).

5 Fontana v. Rice, 644 So. 2d 502 (Fla. 1994); Gaito v. Com., Pennsylvania Bd. of Probation and Parole, 128 Pa. Commw. 253, 563 A.2d 545 (1989).

6 18 U.S.C.A. § 3142(a)(1).

7 § 45.

8 Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); People v. Sanders, 185 Colo. 153, 522 P.2d 735 (1974); Commesso v. Com., 369 Mass. 368, 339 N.E.2d 917 (1975); State v. Pray, 133 Vt. 537, 346 A.2d 227, 78 A.L.R.3d 775 (1975).

9 Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); State v. Pray, 133 Vt. 537, 346 A.2d 227, 78 A.L.R.3d 775 (1975).

10 U.S. v. Bruno, 89 F. Supp. 3d 425 (E.D. N.Y. 2015); Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); People v. Sanders, 185 Colo. 153, 522 P.2d 735 (1974); Jones v. U. S., 347 A.2d 399 (D.C. 1975); State v. Mussman, 178 N.W.2d 319 (Iowa 1970); Commesso v. Com., 369 Mass. 368, 339 N.E.2d 917 (1975); State v. Thompkins, 515 S.W.2d 808 (Mo. Ct. App. 1974); State v. Pray, 133 Vt. 537, 346 A.2d 227, 78 A.L.R.3d 775 (1975).

11 Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); Jones v. U. S., 347 A.2d 399 (D.C. 1975); State v. Churchill, 133 Vt. 338, 341 A.2d 22 (1975).

12 State ex rel. Harrington v. Genung, 300 So. 2d 271 (Fla. 2d DCA 1974).

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8A Am. Jur. 2d Bail and Recognizance § 16

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A. Overview

§ 16. Bail or custody during trial

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A trial court has the right, in its discretion, to order a defendant who has been at large on bail into custody during trial.[1] For instance, a judge who is informed that a defendant is attempting to tamper with the jury has the discretion to direct that the defendant remain in custody during trial.[2]

A statute dealing with recommitting the defendant during trial does not violate a constitutional provision guaranteeing the right to bail and prohibiting excessive bail.[3]

Footnotes

1 State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971).

2 Reaves v. State, 229 Ark. 453, 316 S.W.2d 824 (1958).

3 Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970).
As to a federal judge's power to recommit a person released on personal recognizance, see § 45.
As to excessive bail, generally, see § 87.

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8A Am. Jur. 2d Bail and Recognizance § 17

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A. Overview

§ 17. Arrest and detention or release of material witness

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

A.L.R. Library

Validity, Construction, and Application of 18 U.S.C.A. sec. 3144, Governing Arrest and Detention of Material Witnesses to Federal Crimes, 2 A.L.R. Fed. 2d 425

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions governing the release or detention of a defendant pending trial. A material witness may not be detained because of inability to comply with any condition of release, if the witness's testimony can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.[1]

Material witnesses arrested under the federal material-witness statute enjoy the same constitutional right to pretrial release as other federal detainees.[2] However, release of a material witness may be delayed for a reasonable period until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.[3]

Footnotes

1 18 U.S.C.A. § 3144.

2 Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

3 18 U.S.C.A. § 3144.

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B. After Conviction or Pending Appeal

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Research References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44(1) to 45

A.L.R. Library

A.L.R. Index, Bail and Recognizance
A.L.R. Index, Federal Bail Reform Act
West's A.L.R. Digest, Bail 42, 44(1) to 45

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B. After Conviction or Pending Appeal

§ 18. Bail after conviction or pending appeal, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44(1)

A.L.R. Library

Right of defendant in state court to bail pending appeal from conviction—modern cases, 28 A.L.R.4th 227

Generally speaking, convicted felons do not have a fundamental or constitutional right to postconviction bail,[1] and there is no constitutional right to bail pending an appeal of a conviction.[2] Constitutional guarantees of the right to bail refer only to cases in which the accused has not yet had a trial,[3] and do not confer a right to bail after a conviction,[4] and pending an appeal.[5] However, constitutional provisions concerning bail generally do not prohibit bail after conviction and pending appeal.[6]

Bail pending appeal from a state criminal conviction is generally a matter of the court's discretion,[7] unless a state provision prohibits posttrial bail in certain situations.[8] A statute may allow setting bail pending appeal, so long as it is required to suspend or postpone the execution of the sentence, regardless of the judgment's finality.[9] Other state statutes governing release or detention pending sentencing or appeal are designed to guarantee the performance of the sentence.[10]

It may be necessary to post a proper appeal bond, as an appearance bond may not be sufficient to guarantee the defendant's presence on appeal.[11]

Observation:

A claim with regard to pretrial bail is rendered moot once a defendant is convicted.[12]

Footnotes

1 Williams v. State, 151 P.3d 460 (Alaska Ct. App. 2006); Felix v. State, 905 A.2d 746 (Del. 2006); Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004); Petition of Hamel, 137 N.H. 488, 629 A.2d 802 (1993).

2 Griffith v. State, 641 P.2d 228 (Alaska Ct. App. 1982); Meeks v. State, 341 Ark. 620, 19 S.W.3d 25 (2000); People v. Johnson, 2017 COA 97, 2017 WL 2981216 (Colo. App. 2017); Luke v. State, 282 Ga. App. 749, 639 S.E.2d 645 (2006); Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004); State v. Steffen, 70 Ohio St. 3d 399, 1994-Ohio-111, 639 N.E.2d 67 (1994); Kordelski v. Cook, 1980 OK CR 119, 621 P.2d 1176 (Okla. Crim. App. 1980); State v. Janklow, 2004 SD 36, 678 N.W.2d 189 (S.D. 2004); State v. Burgins, 464 S.W.3d 298 (Tenn. 2015); Anderson v. State, 99 S.W.3d 650 (Tex. App. Waco 2003).
A defendant's right to release on bond pending appeal is statutory, not constitutional. State v. Stradt, 556 N.W.2d 149 (Iowa 1996).
As to bail pending habeas corpus proceedings, generally, see § 23.

3 Braden v. Lady, 276 S.W.2d 664 (Ky. 1955); State v. Helton, 72 Wyo. 105, 261 P.2d 46 (1953).

4 State v. Flowers, 330 A.2d 146 (Del. 1974) (during presentencing period); Blackburn v. Jackson, 74 So. 2d 80 (Fla. 1954); People v. Giacalone, 16 Mich. App. 352, 167 N.W.2d 871 (1969); Hicks v. State, 179 Tenn. 601, 168 S.W.2d 781 (1943); Ex parte Berry, 198 Wash. 317, 88 P.2d 427 (1939).

5 Tyson v. State, 593 N.E.2d 175 (Ind. 1992); State v. Freitag, 281 Minn. 573, 161 N.W.2d 530 (1968).

6 Ex parte Berry, 198 Wash. 317, 88 P.2d 427 (1939); State v. Helton, 72 Wyo. 105, 261 P.2d 46 (1953).

7 State v. Kearney, 206 Ariz. 547, 81 P.3d 338 (Ct. App. Div. 2 2003); McGlade v. State, 941 So. 2d 1185 (Fla. 2d DCA 2006); Johnson v. State, 304 Ga. 369, 818 S.E.2d 601 (2018); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985) (even if the defendant would not have been statutorily eligible for preconviction bail); People v. Brooks, 251 Ill. App. 3d 927, 191 Ill. Dec. 494, 623 N.E.2d 1380 (4th Dist. 1993); State v. Kellogg, 534 N.W.2d 431 (Iowa 1995); Com. v. Peacock, 701 S.W.2d 397 (Ky. 1985); State v. Moore, 419 So. 2d 963 (La. 1982); Hurley v. State, 59 Md. App. 323, 475 A.2d 518 (1984); Forte v. Com., 418 Mass. 98, 634 N.E.2d 573 (1994); Parks v. State, 228 So. 3d 853 (Miss. Ct. App. 2017), cert. denied, 220 So. 3d 977 (Miss. 2017); State v. Dawn, 246 Neb. 384, 519 N.W.2d 249 (1994); State v. Keaton, 61 N.C. App. 279, 300 S.E.2d 471 (1983); State ex rel. Pirman v. Money, 69 Ohio St. 3d 591, 1994-Ohio-208, 635 N.E.2d 26 (1994); State ex rel. O'Neal v. Pearce, 78 Or. App. 317, 717 P.2d 154 (1986); Com. v. McDermott, 377 Pa. Super. 623, 547 A.2d 1236 (1988); State v. Jacques, 514 A.2d 1028 (R.I. 1986); State v. Caruso, 2012 SD 65, 821 N.W.2d 386 (S.D. 2012); Gonzalez v. State, 888 S.W.2d 84 (Tex. App. Amarillo 1994); State v. Hunter, 35 Wash. App. 708, 669 P.2d 489 (Div. 1 1983).

8 McKenzie v. State, 355 So. 2d 434 (Fla. 4th DCA 1977).
As to the effect of the nature of the offense, see § 19.

9 Askew v. Com., 49 Va. App. 127, 638 S.E.2d 118 (2006).

10 State v. Clark, 151 N.H. 56, 849 A.2d 143 (2004) (thus holding that the statute did not provide a basis to continue bail after a deferred sentence was imposed).

11 Robinson v. State, 875 So. 2d 230 (Miss. Ct. App. 2004).

12 U.S. v. Villarman-Oviedo, 325 F.3d 1, 60 Fed. R. Evid. Serv. 1477 (1st Cir. 2003); LaChance v. Com., 437 Mass. 1013, 770 N.E.2d 991 (2002).

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B. After Conviction or Pending Appeal

§ 19. Effect of nature of offense on right to bail after conviction or pending appeal; validity of classification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44(2)

A.L.R. Library

Right of defendant in state court to bail pending appeal from conviction—modern cases, 28 A.L.R.4th 227

Some state statutes have precluded the granting of bail pending appeal to those convicted of certain classes of criminal offenses.[1]

While the allowance of postconviction bail is not constitutionally guaranteed[2] and a state may, if it chooses, decline to provide for it, if the state has established a classification of bailable and nonbailable offenses, that classification may not violate the right to due process guaranteed by the 14th Amendment.[3] When a state makes provisions for bail pending appeal, the Eighth and 14th Amendments require that it may not be denied arbitrarily or unreasonably,[4] and a classification of offenses for which it would or would not be allowed violates equal protection if there is not a rational distinction among the offenses.[5] The application to a defendant of a statute that denies bail pending appeal of a conviction for a particular offense violates the prohibition against ex post facto laws, where the offense was committed before the statute's effective date.[6] However, a statute precluding appeal bonds for persons convicted of enumerated felonies did not violate the separation of powers doctrine, based on a claim that it allegedly interfered with the judiciary's inherent power to set postconviction bond in any criminal case, since the creation of that system was a legislative, not judicial, function.[7]

A court lacked the authority to release a convicted defendant on a bed-space bond, which allows a nonviolent offender to be temporarily released until bed space is available in the state prison, where the defendant had pled guilty to two counts of unlawful discharge of a firearm from a vehicle, which qualified him as a violent offender.[8]

Footnotes

1 Stiegele v. State, 685 P.2d 1255 (Alaska Ct. App. 1984) (unclassified or class A felonies); Johnson v. State, 304 Ga. 369, 818 S.E.2d 601 (2018) (offenses punishable by death); Tyson v. State, 593 N.E.2d 175 (Ind. 1992); State v. Stradt, 556 N.W.2d 149 (Iowa 1996).

2 § 18.

3 Griffith v. State, 641 P.2d 228 (Alaska Ct. App. 1982).

4 State v. Janklow, 2004 SD 36, 678 N.W.2d 189 (S.D. 2004).

5 Griffith v. State, 641 P.2d 228 (Alaska Ct. App. 1982).

6 Cunningham v. State, 423 So. 2d 580 (Fla. 2d DCA 1982).

7 Getkate v. State, 278 Ga. 585, 604 S.E.2d 838 (2004).

8 State v. Britt, 368 Ark. 273, 244 S.W.3d 665 (2006).

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B. After Conviction or Pending Appeal

§ 20. Release on bail pending appeal by state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44(1)

A rule governing release pending an appeal by the state may favor release,[1] and on those rare occasions when the prosecutor believes that compelling reasons exist for detention pending an interlocutory appeal by the state, those reasons must be presented to a judge contemporaneously with the initiation of the appeal, but the court is required to consider the merits of the interlocutory appeal only if its outcome would control the outcome of the prosecution.[2] Under some rules, a defendant must be released when a trial court has dismissed all criminal charges and a new indictment or information is not filed against the defendant, even if the state appeals the dismissal, unless some other charge justifies continuing custody.[3]

Footnotes

1 People v. Baltimore, 381 Ill. App. 3d 115, 319 Ill. Dec. 416, 885 N.E.2d 1096 (2d Dist. 2008).

2 People v. Beaty, 351 Ill. App. 3d 717, 286 Ill. Dec. 602, 814 N.E.2d 590 (5th Dist. 2004).

3 Fontana v. Rice, 644 So. 2d 502 (Fla. 1994).

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II. Right or Authority to Enter into Bail or Recognizance

B. After Conviction or Pending Appeal

§ 21. Bail pending sentence in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A judicial officer of a federal court of original jurisdiction over an offense, or a judicial officer of a federal appellate court, is required to order that, pending imposition or execution of the sentence, a person be released or detained under the provisions of the Bail Reform Act.[1] With certain exceptions, a judicial officer must order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable Sentencing Guideline does not recommend a term of imprisonment, be detained,[2] unless the judicial officer makes a required finding.[3]

A judicial officer must order that a person who has been found guilty of an offense in a case described by the statutory provisions pertaining to detention hearings[4] and is awaiting imposition or execution of sentence, be detained[5] unless the judicial officer again makes the necessary findings.[6]

The statute governing the detention of a person "found guilty of an offense" applies immediately on the return of jury's guilty verdict, and not after entry of a judgment of conviction.[7]

Footnotes

1 18 U.S.C.A. § 3141(b).

2 18 U.S.C.A. § 3143(a)(1).
Fed. R. Crim. P. 46(c) provides that the provisions of 18 U.S.C.A. § 3143 govern release pending sentencing or appeal.

3 § 39.

4 18 U.S.C.A. § 3142(f)(1)(A), (f)(1)(B), or 18 U.S.C.A. § 3142(f)(1)(C), discussed, generally, in § 52.

5 18 U.S.C.A. § 3143(a)(2).

6 § 39.

7 U.S. v. Bloomer, 967 F.2d 761 (2d Cir. 1992).

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8A Am. Jur. 2d Bail and Recognizance § 22

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B. After Conviction or Pending Appeal

§ 22. Bail pending appeal in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44

There is no federal constitutional right to be free pending an appeal.[1]

A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a federal appellate court, must order that, pending an appeal of a conviction or sentence, a person be released or detained under the Bail Reform Act.[2] Except as provided in a statute dealing with specified types of crimes,[3] a judicial officer must order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained,[4] unless the judicial officer makes certain findings.[5]

A judicial officer must order that a person who has been found guilty of an offense in a case described by the statutory provision pertaining to detention hearings[6] be detained.[7]

A judicial officer must treat a defendant in a case in which an appeal has been taken by the United States in accordance with the statute pertaining to release or detention of a defendant pending trial,[8] unless the defendant is otherwise subject to a release or detention order.[9] Except as provided in the provision generally pertaining to release or detention pending appeal by the defendant,[10] the judicial officer, in a case in which an appeal has been taken by the United States must, if the person has been sentenced to a term of imprisonment, order that person detained,[11] and in any other circumstance, release or detain the person under the applicable provision.[12]

With regard to appeals from misdemeanor or other petty offense cases, the defendant may be released pending appeal in accordance with the provisions relating to release pending appeal from a judgment of a district court to a court of appeals.[13]

Observation:

The Bail Reform Act of 1984 made it much more difficult for a convicted criminal defendant to obtain release pending appeal, since the Act's intent was that fewer convicted persons remain at large while pursuing their appeals.[14]

Footnotes

1 U.S. v. Sine, 461 F. Supp. 565 (D.S.C. 1978).

2 18 U.S.C.A. § 3141(b).

3 18 U.S.C.A. § 3143(b)(2).

4 18 U.S.C.A. § 3143(b)(1).
Fed. R. Crim. P. 46(c) provides that the provisions of 18 U.S.C.A. § 3143 govern release pending appeal.

5 § 40.

6 18 U.S.C.A. § 3142(f)(1)(A), (f)(1)(B), or 18 U.S.C.A. § 3142(f)(1)(C), discussed, generally, in § 52.

7 18 U.S.C.A. § 3143(b)(2).

8 18 U.S.C.A. § 3142.

9 18 U.S.C.A. § 3143(c).

10 18 U.S.C.A. § 3143(b).

11 18 U.S.C.A. § 3143(c)(1).

12 18 U.S.C.A. § 3143(c)(2) (referring to 18 U.S.C.A. § 3142).

13 Fed. R. Crim. P. 58(g)(3).

14 U.S. v. Marshall, 78 F.3d 365 (8th Cir. 1996).

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B. After Conviction or Pending Appeal

§ 23. Bail pending habeas corpus or postconviction proceeding

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A federal court, when a habeas corpus proceeding is pending before it, has the right to release a convicted state prisoner on bail.[1] Even so, in the habeas context, the Federal Court of Appeals has reserved bail for extraordinary cases involving special circumstances or a high probability of success.[2]

The Bail Reform Act does not apply to federal prisoners seeking postconviction relief. Instead, a Federal Rule of Appellate Procedure[3] governs the issue of the release or detention of a prisoner, state or federal, who is collaterally attacking his or her criminal conviction.[4]

Footnotes

1 State v. Shumate, 107 Wis. 2d 460, 319 N.W.2d 834 (1982) (so recognized, in denying that the state courts have the power to release the defendant after state appeals have been exhausted).

2 U.S. v. Mett, 41 F.3d 1281 (9th Cir. 1994), as amended on other grounds, (Feb. 8, 1995).

3 Fed. R. App. P. 23.

4 U.S. v. Mett, 41 F.3d 1281 (9th Cir. 1994), as amended on other grounds, (Feb. 8, 1995).

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B. After Conviction or Pending Appeal

§ 24. Bail pending appeal from habeas corpus order

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44(2)

While there is some authority for the view that, on appeal from an adverse judgment in habeas corpus proceedings, the petitioner is entitled to bail pending the appeal,[1] some courts hold that a prisoner is not entitled to bail while appealing the denial of a petition for postconviction relief.[2]

Under the rules of the Supreme Court, pending review of a decision in a habeas corpus proceeding failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be released on personal recognizance or bail, as may appear appropriate to the court, justice, or judge who entered the decision, or to the court of appeals, the Supreme Court, or a judge or justice of either court.[3] Furthermore, pending review of a decision ordering release, the prisoner must be released on personal recognizance or bail, unless the court, justice, or judge who entered the decision, or the court of appeals, the Supreme Court, or a judge or justice of either court, orders otherwise.[4] An initial order respecting the custody or release of the prisoner, and any recognizance or surety taken, will continue in effect pending review in the court of appeals and in the Supreme Court, unless for reasons shown to the court of appeals, the Supreme Court, or a judge or justice of either court, the order is modified or an independent order respecting custody, release, or surety is entered.[5]

Provisions similar to those in the Supreme Court Rules are also found in the Rules of Appellate Procedure.[6]

Footnotes

1 Bongiovanni v. Ward, 50 F. Supp. 3 (D. Mass. 1943).

2 Crady v. Cranfill, 371 S.W.2d 640 (Ky. 1963); Atwell v. State, 848 So. 2d 190 (Miss. Ct. App. 2003).

3 U.S. Sup. Ct. R. 36(3)(a).

4 U.S. Sup. Ct. R. 36(3)(b).

5 U.S. Sup. Ct. R. 36(4).

6 Fed. R. App. P. 23(b) to (d).

Pursuant to Fed. R. App. P. 23(c), a U.S. Court of Appeals may act on an application for bail, even if the case is pending in the United States Supreme Court. Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985).

A state prisoner should not have been released on bail pending appeal from the district court's order granting his petition for a writ of habeas corpus, where he faced a life sentence if his conviction were affirmed by the state court, and that order should be stayed. U. S. ex rel. Rice v. Vincent, 486 F.2d 215 (2d Cir. 1973).

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8A Am. Jur. 2d Bail and Recognizance § 25

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II. Right or Authority to Enter into Bail or Recognizance

B. After Conviction or Pending Appeal

§ 25. Probation violators as entitled to bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

In some states, a person who is in custody as a condition of probation or pursuant to a motion to revoke is not entitled to post bond,[1] and does not have a right to release pending probation revocation proceedings.[2] A violation of probation carries with it potential collateral consequences and may be considered in future proceedings, such as those regarding bail.[3] A defendant who violates probation is not in the same position as a person arrested for the commission of a crime for which one is deemed innocent until proven guilty beyond a reasonable doubt, and therefore there is no constitutional right to bail pending revocation of probation.[4] However, some courts have the discretionary power to grant or deny bail to individuals who are charged with violating probation.[5]

Footnotes

1 Ex parte Harris, 946 S.W.2d 79 (Tex. Crim. App. 1997).

2 State v. Wilson, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995).

3 Commonwealth v. Bain, 93 Mass. App. Ct. 724, 108 N.E.3d 481 (2018), review denied, 480 Mass. 1110, 113 N.E.3d 838 (2018).

4 Peraza v. Bradshaw, 966 So. 2d 504 (Fla. 4th DCA 2007).

5 Woods v. State, 987 So. 2d 669 (Fla. 2d DCA 2007) (disapproved of on other grounds by, Plank v. State, 190 So. 3d 594 (Fla. 2016)).

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West's Key Number Digest

West's Key Number Digest, Bail 40 to 43, 49(2)

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

1. State Courts

§ 26. Particular factors affecting right to or granting of bail or recognizance in state courts, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 43, 49(2)

When fixing bail, it must be determined in the first instance whether the offense is bailable.[1] State constitutional provisions generally provide that all persons are bailable or have the right to bail,[2] except with regard to capital or other specific types of offenses.[3]

A court has the inherent power to deny bail to protect its processes[4] and the community.[5] Furthermore, it has been said that the primary inquiry is whether recognizance or a bond would secure the accused's appearance and submission to the court's jurisdiction and judgment.[6] A bond with sufficient conditions is warranted, where the crimes charged did not constitute "dangerous crimes," as defined by the applicable provision, and sufficiently stringent conditions are available to protect the public, as well as to assure the appearance of the defendant at future proceedings.[7] Among the factors the court considers in determining whether to allow bail is the likelihood that the defendant will flee the jurisdiction if released on bail.[8] The judiciary has the inherent power to deny bail when necessary to secure a defendant's appearance.[9] Additionally, some courts consider the seriousness of the offense charged, and the defendant's criminal record.[10] A court may also consider the defendant's family ties, record of appearance as required by other bonds, and facts indicating the possibility of violations of law or harassment of witnesses while the defendant is released on bond.[11]

Footnotes

1 Green v. Petit, 222 Ind. 467, 54 N.E.2d 281 (1944); State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948); State v. Mastrian, 266 Minn. 58, 122 N.W.2d 621 (1963).

2 § 29.

3 § 29.

4 State v. Dodson, 556 S.W.2d 938 (Mo. Ct. App. 1977).

5 § 27.

6 State v. Olson, 82 S.D. 605, 152 N.W.2d 176 (1967).

7 Almazrouei v. State, 971 So. 2d 185 (Fla. 5th DCA 2007).
Conditions are discussed, generally, in §§ 42 to 45.

8 Kraft v. State, 156 So. 3d 1116 (Fla. 4th DCA 2015); Wilcox v. State, 249 Ga. 734, 293 S.E.2d 716 (1982); State v. Stucke, 419 So. 2d 939 (La. 1982); Bradds v. Randolph, 239 Md. App. 50, 194 A.3d 444 (2018); Lane v. State, 98 Nev. 458, 652 P.2d 1174 (1982) (overruled on other grounds by, Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004)); People v. Vasquez, 88 A.D.2d 667, 450 N.Y.S.2d 606 (2d Dep't 1982); State v. Engel, 284 N.W.2d 303 (N.D. 1979); Ex parte Nimnicht, 467 S.W.3d 64 (Tex. App. San Antonio 2015); State v. Blow, 201 Vt. 633, 2015 VT 143, 135 A.3d 672 (2015); Grimes v. Plumley, 2013 WL 5967042 (W. Va. 2013).

9 Querubin v. Com., 440 Mass. 108, 795 N.E.2d 534 (2003).

10 People v. Rickman, 155 P.3d 399 (Colo. App. 2006), judgment aff'd in part, rev'd in part on other grounds, 178 P.3d 1202 (Colo. 2008); Miller v. Eleventh Judicial Dist. Court, 2007 MT 58, 336 Mont. 207, 154 P.3d 1186 (2007); State v. Hoffman, 183 Vt. 547, 2007 VT 141, 944 A.2d 912 (2007) (lack of criminal record considered).

11 People v. Rickman, 155 P.3d 399 (Colo. App. 2006), judgment aff'd in part, rev'd in part on other grounds, 178 P.3d 1202 (Colo. 2008).

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A. Overview

1. State Courts

§ 27. Safety or danger to community, persons, or property as factor affecting right to or granting of bail or recognizance in state courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 49(2)

Courts have the inherent power to deny bail to protect the community.[1] Furthermore, some state constitutions expressly provide that the court may deny bail, on a showing that the defendant poses a danger to a crime victim, the community, or any other person.[2]

In some jurisdictions, the trial court may release a person on bail if the court finds, among other things, that the person poses no significant threat or danger to any person, to the community, or to any property in the community.[3] Conversely, a court may deny bail and keep the accused in custody pending trial to prevent the fulfillment of threats,[4] if the police recovered a considerable amount of gunpowder an ammunition at the defendant's home,[5] or if no amount of monitoring would be sufficient to prevent a threat to the public or the defendant himself.[6] It is not necessary to show a threat to a specific person, so long as a general threat of danger to the community is shown.[7]

An arrestee's past conduct is essential to an assessment of the danger he or she poses to the public, and this will inform a court's determination whether the individual should be released on bail.[8]

Footnotes

1 State v. Dodson, 556 S.W.2d 938 (Mo. Ct. App. 1977).

2 In re Conard, 944 S.W.2d 191 (Mo. 1997).

3 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

4 People ex rel. Hemingway v. Elrod, 60 Ill. 2d 74, 322 N.E.2d 837 (1975); State v. Dodson, 556 S.W.2d 938 (Mo. Ct. App. 1977) (reliable evidence that the defendant would threaten a witness).

5 Wheeler v. State, 160 Md. App. 566, 864 A.2d 1058 (2005).

6 Woods v. State, 965 So. 2d 725 (Miss. Ct. App. 2007).

7 State v. Woodcock, 168 Vt. 588, 719 A.2d 32 (1998).

8 Maryland v. King, 569 U.S. 435, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

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8A Am. Jur. 2d Bail and Recognizance § 28

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

1. State Courts

§ 28. Safety or danger to community, persons, or property as factor affecting right to or granting of bail or recognizance in state courts—Preventive detention

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A.L.R. Library

Pretrial preventive detention by state court, 75 A.L.R.3d 956

Preventive detention of the potentially dangerous has been said not to be constitutionally acceptable.[1] In a jurisdiction following this view, a state court may not deny bail to safeguard the well-being of witnesses in a case or to protect the community from further criminal activity by the accused, because anticipated criminal activity alone is not a ground for the denial of bail.[2] However, a denial of bail does not constitute impermissible preventive detention in violation of a defendant's due process rights where the trial court bases its decision to deny bail primarily on defendant's long history of disobeying court orders, a history the trial court finds warrants serious doubt about whether defendant will obey the conditions of release and, by extension, whether the public will be adequately protected.[3] Also, it has been said that in appropriate cases, pretrial detention is a constitutionally permissible regulatory vehicle to provide a temporary period during which a person charged with a serious crime may be detained, even though that person's guilt has not been established.[4]

Some state statutes authorize preventative detention, where there is clear and convincing evidence that the defendant is a danger to another person or to the community, and that no condition or combination of conditions of pretrial release can reasonably

protect against that danger.[5] It has been noted that pretrial detention is not to be employed as a device to punish a defendant before guilt has been determined, nor to express outrage at a defendant's evident wrongdoing, but its sole purpose is to ensure public safety and the defendant's future appearance in court when the government proves that conditions of release cannot achieve those goals.[6] Accordingly, a statute providing that a person arrested for committing domestic violence could be detained for up to 48 hours, awaiting a hearing on the conditions of pretrial release, did not facially violate the double jeopardy clause, despite a claim that the defendant was punished twice, since the statute's purpose was regulatory rather than punitive, to ensure review by a judge before the alleged offender would be released, and the statute did not preclude immediate review by a judge if scheduling permits.[7]

A statute authorizing preventive detention when there is a serious risk that a defendant will threaten, injure, or intimidate a prospective witness requires a nexus between the defendant's coercive conduct and the potential victim's status as a witness.[8] A bona fide threat of future obstruction of justice constitutes a threat to public safety, as a basis for pretrial detention, but a showing of a substantial probability that the defendant committed the charged offense of obstructing justice does not necessarily provide clear and convincing evidence of future dangerousness.[9]

A trial court may not have the authority to impose pretrial detention in the absence of a motion by the prosecutor.[10] The state's failure or decision not to seek pretrial detention makes bond mandatory,[11] and the court may only consider conditions of release.[12]

CUMULATIVE SUPPLEMENT

Cases:

Likelihood that proposed release of defendant charged with being felon in possession of firearm would increase COVID-19 risks to others was factor favoring conclusion that defendant's COVID-19 concerns were not compelling reason warranting his temporary release from pretrial detention; defendant had violated conditions of release previously, supervising defendant would heighten Pretrial Services officers' risk of contracting coronavirus, and other law enforcement would face same risk when re-apprehending defendant at release's end. 18 U.S.C.A. § 3142(i). United States v. McDonald, 451 F. Supp. 3d 1174 (D. Nev. 2020).

[END OF SUPPLEMENT]

Footnotes

1 State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993).

2 Com. v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972).

3 State v. Brillon, 188 Vt. 537, 2010 VT 48, 996 A.2d 1187 (2010).

4 Tyler v. U.S., 705 A.2d 270 (D.C. 1997).

5 Wheeler v. State, 160 Md. App. 566, 864 A.2d 1058 (2005).
Absent proof of existence of at least one of the circumstances listed in a statute governing pretrial detention, a trial court may not order it. Schwartz v. Neumann, 731 So. 2d 746 (Fla. 4th DCA 1999).

6 Blackson v. U.S., 897 A.2d 187 (D.C. 2006).

7 State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

8 Covington v. U.S., 698 A.2d 1033 (D.C. 1997).

9 Blackson v. U.S., 897 A.2d 187 (D.C. 2006).

10 Miller v. State, 980 So. 2d 1092 (Fla. 2d DCA 2008).

11 Duffy v. Crowder, 960 So. 2d 909 (Fla. 4th DCA 2007).

12 Rodriguez v. Jenne, 963 So. 2d 933 (Fla. 4th DCA 2007).

Conditions are discussed in §§ 42 to 45.

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

1. State Courts

§ 29. Type of offense or punishment involved as factor affecting right to or granting of bail or recognizance in state courts; capital offenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 43

A.L.R. Library

Comment Note.—Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions, 71 A.L.R.3d 453

Under state law, it is often the case that all persons are bailable or have the right to bail,[1] except where capital offenses[2] or offenses punishable by life imprisonment[3] are involved, if the proof is evident or the presumption great,[4] there is substantial evidence to support the charge,[5] the evidence of guilt is great,[6] or giving due weight to the evidence and to the nature and circumstances of the event.[7] Furthermore, some provisions except from a requirement that persons must be released on bail where the accused had committed a felony while having been previously admitted to bail.[8] A classification of serious offenses for which bail may be denied has been upheld.[9]

A provision that no right of bail is afforded to a defendant charged with a capital offense or an offense punishable by life imprisonment if the proof of guilt is evident and the presumption great does not necessarily deprive a trial court of the discretion to grant bail in such a situation, but those persons are not entitled to bail as a matter of right.[10] A constitutional provision that bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment also gives a trial court

judge the discretion to grant bail to a capital defendant.[11] Also, if the proof of guilt is not evident and the presumption is not great, bail becomes a matter of right.[12]

Observation:

The state constitutional provisions recognize the risks inherent in admitting capital defendants to bail: first, the risk that a defendant may flee to avoid prosecution is generally greater in a capital case than in a noncapital one; second, because of the heinous nature of the offense usually alleged to have been committed in a capital case, the danger posed to the community by the release of a capital defendant is normally substantial. As a result of these risks, the discretion to admit a capital defendant to bail should be exercised with utmost caution, and, in practice, capital defendants are rarely admitted to bail pending trial.[13]

The fact that the penalty may be, instead of death, imprisonment for life or for a term of years, does not necessarily change the capital character of an offense, so as to entitle a person charged with such an offense to bail under a provision that all persons shall be bailable except for capital offenses.[14] This rule applies even where it was stipulated that the death penalty would not be imposed.[15] However, if the state constitution or bail statute only excepts offenses punishable by death or life imprisonment, the removal of the death penalty for a specific crime, such as armed robbery, means that a person accused of that crime is entitled to bail.[16]

Under a constitutional provision that all defendants are bailable except those charged with a capital offense where the proof is evident or the presumption great, the abolition of capital punishment has been construed as making all persons charged with crime bailable.[17] A defendant may also be entitled to bail where the imposition of the death penalty, which would ordinarily preclude bail, is found to be unconstitutionally excessive punishment for the crime in question.[18] However, some jurisdictions have held that the power to deny bail for capital offenses remains unchanged, despite the abolition or invalidity of the death penalty, reasoning that the classification of capital offenses remained valid for the purpose of a bail determination, despite the inability to inflict the death penalty as punishment.[19] Furthermore, a state statute denying bail in both capital cases and those involving offenses punishable by life imprisonment is not affected by the abolition of the death penalty.[20]

CUMULATIVE SUPPLEMENT

Cases:

Because capital punishment had been statutorily abolished as a punishment for first-degree murder, first-degree murder was not a capital offense for which bail could be categorically denied under New Mexico Constitution, despite fact that statute still referred to the crime as capital; legislature lacked the power to redefine constitutional terms. N.M. Const. art. 2, § 13; N.M. Stat. Ann. §§ 31-18-14, 31-18-23, 31-20A-2. State v. Ameer, 2018-NMSC-030, 458 P.3d 390 (N.M. 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 12.

2 Smart v. City of Miami, 107 F. Supp. 3d 1271 (S.D. Fla. 2015) (under Florida law); Martin v. State, 517 P.2d 1389, 75 A.L.R.3d 941 (Alaska 1974); Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996); Yording v. Walker, 683 P.2d 788 (Colo. 1984); State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995); Ex parte Dennis, 334 So. 2d 369 (Miss. 1976); In re Conard, 944 S.W.2d 191 (Mo. 1997); Application of Knast, 96 Nev. 597, 614 P.2d 2 (1980); State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985); Com. v. Brown, 2005 PA Super 180, 875 A.2d 1128 (2005); State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994); State v. Kastanis, 848 P.2d 673 (Utah 1993).

3 People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995); State v. Furgal, 161 N.H. 206, 13 A.3d 272 (2010); State v. Avgoustov, 180 Vt. 595, 2006 VT 90, 907 A.2d 1185 (2006) (aggravated sexual assault); State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

4 Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996); Yording v. Walker, 683 P.2d 788 (Colo. 1984); State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992); Steigler v. Superior Court In and For New Castle County, 252 A.2d 300 (Del. 1969) (state constitutional provision to this effect does not violate the Eighth and 14th Amendments); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995); Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997); Harnish v. State, 531 A.2d 1264 (Me. 1987); Ex parte Dennis, 334 So. 2d 369 (Miss. 1976); In re Conard, 944 S.W.2d 191 (Mo. 1997); Application of Knast, 96 Nev. 597, 614 P.2d 2 (1980); State v. Furgal, 161 N.H. 206, 13 A.3d 272 (2010); State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).

The trial court did not abuse its discretion in concluding that the weight of the evidence favored holding defendant without bail based, in part, on defendant's concession that the state had "great" evidence of guilt within the meaning of a statute permitting a defendant charged with an offense punishable by life imprisonment to be held without bail, in a prosecution for sexual assault. State v. Henault, 204 Vt. 628, 2017 VT 19, 167 A.3d 892 (2017).

As to the burden of proof as to bail in a capital case, see § 62, and sufficiency of proof, see § 65.

5 State v. Kastanis, 848 P.2d 673 (Utah 1993).

6 State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993).

7 State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

8 Heath v. Kiger, 217 Ariz. 492, 176 P.3d 690 (2008) (includes persons released on personal recognizance).

9 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

10 State v. Arthur, 390 So. 2d 717 (Fla. 1980).

Under a constitutional provision that all persons shall be bailable, except for a person who is charged with a capital offense where the proof is evident or the presumption great, it is the trial court's role to determine whether a capital defendant should be admitted to bail. State v. Hughbanks, 99 Ohio St. 3d 365, 2003-Ohio-4121, 792 N.E.2d 1081 (2003).

11 State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

12 Application of Knast, 96 Nev. 597, 614 P.2d 2 (1980); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 89 A.L.R.2d 345 (1960); State ex rel. Holloway v. Joyner, 173 Tenn. 298, 117 S.W.2d 1, 118 A.L.R. 1113 (1938).

13 State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

Bail is denied in capital cases because it is assumed that the prisoner will forfeit the bail rather than forfeit his or her life. Application of Corbo, 54 N.J. Super. 575, 149 A.2d 828 (App. Div. 1959).

14 Rowe v. State, 417 So. 2d 981 (Fla. 1982); State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948); Com. ex rel. Alberti v. Boyle, 412 Pa. 398, 195 A.2d 97 (1963); Ex parte Berry, 198 Wash. 317, 88 P.2d 427 (1939).

15 State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948).

16 Ex parte Dennis, 334 So. 2d 369 (Miss. 1976).

17 State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958).

18 State v. Polk, 376 So. 2d 151 (La. 1979) (aggravated kidnapping resulting in rape).

19 Ex parte Bynum, 294 Ala. 78, 312 So. 2d 52, 71 A.L.R.3d 442 (1975); People ex rel. Dunbar v. District Court of Eighteenth Judicial Dist., 179 Colo. 304, 500 P.2d 358 (1972); Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972); In re Kennedy, 1973 OK CR 316, 512 P.2d 201 (Okla. Crim. App. 1973).

20 Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972).

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A. Overview

1. State Courts

§ 30. Indigence as factor affecting right to or granting of bail or recognizance in state courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 40, 41

While there is authority for the view that an indigent person may, in the sound discretion of the committing magistrate, be held in custody if he or she is unable to post bail,[1] it has also been stated that a bail system based on monetary bail alone would be unconstitutional, with regard to equal protection and due process rights of indigent pretrial detainees,[2] and that an accused may not be denied release from detention because of indigence.[3] However, a state criminal procedure rule that provides for various means by which an accused may be released pending trial (one of which is money bail) is not facially unconstitutional merely because it fails to express a presumption against money bail in favor of the other enumerated means of release.[4] A defendant's inability to post bond, which allegedly caused him to serve more time than someone who had the ability to post bond, did not violate the constitutional right to equal protection,[5] and has been said to be an improper basis for overturning a trial court's decision setting bail.[6]

Footnotes

1 State ex rel. Harrington v. Genung, 300 So. 2d 271 (Fla. 2d DCA 1974).

2 § 15.

3 Bandy v. U.S., 82 S. Ct. 11, 7 L. Ed. 2d 9 (1961).
A county's bail-setting procedure under which secured bail orders were imposed on misdemeanor arrestees violated indigent arrestees' rights to equal protection; under the county's system, indigent arrestees who could not pay secured bail were incarcerated whereas similarly situated wealthy arrestees who could pay secured bail were not, and, although the county had a compelling interest in the assurance of a misdemeanor

detainee's future appearance and lawful behavior, its policy was not narrowly tailored to meet that interest absent any link between the financial conditions of release and appearance at trial or law-abiding behavior before trial. ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018).

As to the requirement under the Bail Reform Act that a financial condition resulting in pretrial detention may not be imposed, see § 45.

4 Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).

5 Wooten v. Commissioner of Correction, 104 Conn. App. 793, 936 A.2d 263 (2007).

6 State v. Hoffman, 183 Vt. 547, 2007 VT 141, 944 A.2d 912 (2007).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

1. State Courts

§ 31. Insanity plea as factor affecting right to or granting of bail or recognizance in state courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A.L.R. Library

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385

A court does not have the power to read into the constitutional provision that "all persons shall be bailable," except for capital offenses, a second exception that one becomes unbailable by pleading not guilty by reason of insanity.[1] However, there is nothing arbitrary or unconstitutional in committing a defendant charged with murder in the second degree, who raised the defense of insanity, to a mental hospital for a reasonable time for examination, and such a commitment does not violate the accused's right to bail.[2]

Footnotes

1 Palmer v. District Court of City and County of Denver, Second Judicial Dist., 156 Colo. 284, 398 P.2d 435, 11 A.L.R.3d 1380 (1965).

2 Battle v. Cameron, 260 F. Supp. 804 (D. D.C. 1966).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

2. Federal Courts

§ 32. Federal judicial officers as required to order pretrial detention where appearance of accused and safety of other persons and community cannot be assured

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A.L.R. Library

Propriety of denial of pretrial bail under Bail Reform Act (18 U.S.C.A. secs. 3141 et seq.), 75 A.L.R. Fed. 806
Construction and application of provisions of Federal Bail Reform Act of 1966 (18 U.S.C.A. secs. 3146, 3147) governing pretrial release or bail of persons charged with noncapital offense, 8 A.L.R. Fed. 586

If, after a hearing, a federal judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer must order the person's detention before trial.[1]

Assuring a criminal defendant's appearance at trial is a legitimate government objective, supporting pretrial detention.[2] Although the function of bail is to provide reasonable assurance of the accused's appearance, this requirement under the Bail Reform Act is not a demand for absolute certainty that the defendant will appear.[3]

CUMULATIVE SUPPLEMENT

Cases:

Neither Immigration and Customs Enforcement (ICE) nor any other part of the executive branch may hold someone in detention for the purpose of securing her appearance at a criminal trial without satisfying the requirements of the Bail Reform Act (BRA). 18 U.S.C.A. § 3141 et seq. United States v. Munoz-Garcia, 455 F. Supp. 3d 915 (D. Ariz. 2020).

Under section of Bail Reform Act governing temporary release for compelling reason, a court cannot grant release of a defendant previously deemed to be a danger to public safety or a risk of flight based solely on the generalized risks that COVID-19 admittedly creates for all members of society. 18 U.S.C.A. § 3142(i). United States v. Maldonado, 454 F. Supp. 3d 443 (M.D. Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3142(e)(1).
Pretrial detention of defendant was appropriate, where defendant presented a flight risk, and his release would endanger the safety of other persons and the community, and no condition or combination of conditions would reasonably protect against those risks. United States v. Pirk, 220 F. Supp. 3d 402 (W.D. N.Y. 2016).
As to conditions of release, generally, see §§ 42 to 45.
As to a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community, see § 61.

2 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003).

3 U.S. v. Alston, 420 F.2d 176, 8 A.L.R. Fed. 579 (D.C. Cir. 1969).

8A Am. Jur. 2d Bail and Recognizance § 33

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

2. Federal Courts

§ 33. Risk of flight as factor affecting right to or granting of bail or recognizance in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

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What constitutes a risk of flight so as to render a federal criminal defendant ineligible for bail prior to sentence or pending appeal, 79 A.L.R. Fed. 460

The high risk of a defendant's flight prior to trial has been a factor considered by federal courts in denying pretrial bail.[1] In deciding whether to order defendant's pretrial detention based on a risk of flight, the court must consider the record before it in light of factors that include (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against defendant; (3) defendant's history and characteristics, including, among other factors, family ties, employment, financial resources, past conduct, criminal history, and whether defendant was on release pending trial; and (4) the nature and seriousness of the danger to any person or the community that would be posed by defendant's release.[2] Evidence that a person who was arrested has attenuated community ties and a history of fleeing legal troubles supports a finding that the accused poses a risk of flight, warranting pretrial detention.[3] However, even if a defendant does not poses a risk of flight, the person must be detained pending trial if there is no condition or combination of conditions that will reasonably assure that person's appearance at trial and the safety of the community.[4]

Even if there is a serious risk of flight, detention is precluded if the prosecution fails to show that conditions could not be reasonably imposed to assure the defendant's presence in court, such as where the government had identified, and defendants had agreed to a set of conditions deemed necessary, including extraordinary restraints on assets and home confinement under surveillance.[5] On the other hand, a flight risk may be established, even though the defendant's relatives were willing to pledge their equity interest in their home to assure the defendant's appearance at trial and to supervise the defendant, and electronic monitoring was available, where the defendant faced a long maximum sentence and was not a United States citizen.[6]

CUMULATIVE SUPPLEMENT

Cases:

Defendant's status as diabetic that put him at increased risk for experiencing severe illness if he were to contract COVID-19 was not sufficiently compelling reason under Bail Reform Act to persuade court that temporary release was necessary, since defendant was high-risk offender, supervising him in community would place pretrial services officers at heightened risk of contracting virus, risk of outbreak at detention facility was speculative, proposed release plan would not have necessarily alleviated his overall COVID-19 risks, and United States Marshal Service officers would be placed at risk in re-apprehending him if and when temporary release inevitably ends and facility would be placed at risk when he eventually reentered it after having had abundant opportunity for contamination. 18 U.S.C.A. § 3142(i). United States v. Clark, 448 F. Supp. 3d 1152 (D. Kan. 2020).

Defendant who was charged with using the internet to attempt to persuade, induce, entice, and coerce a minor to engage in sexual activity was not a flight risk, for purposes of determining whether pre-trial detention was appropriate under the Bail Reform Act (BRA), where defendant grew up, attended high school and community college, and currently lived in the state, his family, including his mother, father, fiance, and infant child, resided in the state, and defendant did not possess a valid passport and had never traveled outside the United States. 18 U.S.C.A. § 3142(g)(3). United States v. Cornish, 449 F. Supp. 3d 681 (E.D. Ky. 2020).

Compelling reasons warranted defendant's temporary release from custody under Bail Reform Act, based on COVID-19 pandemic, with strict conditions to reasonably assure safety of community and defendant's appearance as required by the court; although defendant did not have physical conditions that put him at high risk if he contracted virus, there were incidents of COVID-19 among inmate population at jail where he was being detained, inmates at facility were not able to engage in social distancing being urged upon non-incarcerated residents of Massachusetts, release would not give defendant opportunity to re-create his drug trafficking business, which required travel throughout Commonwealth, air travel was restricted due to pandemic, and defendant did not have criminal record. 18 U.S.C.A. § 3142(i). United States v. Le, 457 F. Supp. 3d 6 (D. Mass. 2020).

Clear and sufficient evidence existed to show that conditions of release to home confinement could be fashioned that would insure that defendant convicted of being a felon in possession of a firearm would not be a flight risk or a danger to the community, secure his appearance for sentencing, and serve to diminish the risk of contracting COVID-19; defendant suffered from hypertension, which made him more susceptible to the COVID-19 virus, and which created a strong disincentive for both flight and criminal activity, and his fiancee was willing to act as a responsible third-party custodian if defendant was released to home confinement pending sentencing. 18 U.S.C.A. § 3143(a). United States v. Sanders, 466 F. Supp. 3d 779 (E.D. Mich. 2020).

Even if pretrial detainee was not a flight risk, his individual COVID-19 risk was not a compelling reason to justify temporary release from custody; while detainee asserted that his asthma and allergies would greatly exacerbate the life-threatening nature of a COVID-19 infection, the objective evidence showed he never mentioned his asthma or allergies when questioned by the FBI agents who escorted him back to the United States from Switzerland, and when asked about his medical conditions, he only stated that he suffered from high blood pressure, his prison medical records, which began from the date of his initial intake,

did not show any respiratory issues, and even if released, detainee would still face the risk of exposure. 18 U.S.C.A. § 3142(i). United States v. Gongda Xue, 459 F. Supp. 3d 659 (E.D. Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. El-Gabrowny, 35 F.3d 63 (2d Cir. 1994) (terrorism suspect's possession of several fraudulent passports indicated an inclination to flee); United States v. Muhtorov, 702 Fed. Appx. 694 (10th Cir. 2017), cert. denied, 138 S. Ct. 430, 199 L. Ed. 2d 318 (2017); United States v. Amar, 300 F. Supp. 3d 287 (D.D.C. 2018); United States v. Baker, 2018 WL 4915828 (D.N.M. 2018); United States v. Pirk, 220 F. Supp. 3d 402 (W.D. N.Y. 2016); United States v. Mallory, 268 F. Supp. 3d 854 (E.D. Va. 2017).

2 United States v. Paulino, 335 F. Supp. 3d 600 (S.D. N.Y. 2018).

3 U.S. v. Kisling, 334 F.3d 734 (8th Cir. 2003).

4 U.S. v. Ramirez, 843 F.2d 256 (7th Cir. 1988).

5 U.S. v. Sabhnani, 493 F.3d 63 (2d Cir. 2007).

6 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

2. Federal Courts

§ 34. Risk to other person or community as factor affecting right to or granting of bail or recognizance in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

The Bail Reform Act's authorization of pretrial detention if conditions will not reasonably assure the safety of any other person and the community[1] is a permissible regulation that does not violate substantive due process, and does not constitute impermissible punishment before trial.[2] While a court may not demand more than an objectively reasonable assurance of community safety, it should not release a defendant if the conditions depend on the defendant's good faith compliance.[3]

Pretrial detention is not authorized solely on the ground of dangerousness to another person or the community, at least where the case does not involve a crime of violence, potential life imprisonment or the death penalty, certain drug offenses, or certain prior convictions.[4] However, "danger," in this context, was not meant to refer only to the risk of physical violence, nor is measured relative to dangerousness if the accused is incarcerated.[5] A court may refuse bail on the ground that the defendant poses a threat to the community, even though the threat is pecuniary rather than physical.[6]

The Bail Reform Act indicates that an especially significant consideration in determining danger to the community is a drug network's ability to continue functioning while the defendant awaits trial.[7] Clear and convincing evidence may also establish that in the case of an alleged leader of an organized crime family, bail conditions could not ensure the community's safety.[8]

A magistrate judge had the discretion to hold a defendant without bond pending trial as a danger to the community, based on allegations that the defendant possessed a machine gun, tools necessary to convert additional weapons into machine guns, and was an armed conspirator, who engaged in drug trafficking.[9]

Detaining adults who prey on children for sexual gratification or for the production of child pornography is a legitimate government objective, supporting pretrial detention, and the fact that a minor victim consented to the sexual activity does not mitigate the danger to the community.[10]

Footnotes

1 18 U.S.C.A. § 3142(e).

2 U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

3 U.S. v. Tortora, 922 F.2d 880 (1st Cir. 1990).
Detention was authorized where no condition or combination of conditions proposed by a defendant charged with terrorism was sufficient to reasonably assure the safety of a community affected by the defendant's alleged knowing support of an overseas terrorist, and the proposed conditions depended on the defendant's good faith; the term "community" is not limited solely to a geographic location within the court's jurisdiction, but may include one in a foreign country, at least where the defendant is charged with a crime under United States law having effects felt abroad. U.S. v. Hir, 517 F.3d 1081 (9th Cir. 2008).

4 U.S. v. Ploof, 851 F.2d 7 (1st Cir. 1988).
As to the factors to be considered by the judicial officer, see § 35.

5 U.S. v. Tortora, 922 F.2d 880 (1st Cir. 1990).

6 U.S. v. Moss, 522 F. Supp. 1033 (E.D. Pa. 1981), aff'd, 688 F.2d 826 (3d Cir. 1982).

7 U.S. v. Ramirez, 843 F.2d 256 (7th Cir. 1988).

8 U.S. v. Ciccone, 312 F.3d 535 (2d Cir. 2002).

9 U.S. v. Daychild, 357 F.3d 1082 (9th Cir. 2004).

10 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

2. Federal Courts

§ 35. Information considered by federal courts in deciding whether conditions of release will assure defendant's appearance and safety of others

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer must take into account the available information concerning:

- the nature and circumstances of the offense charged,[1] including whether the offense is a crime of violence,[2] a federal crime of sex trafficking of children or by force, fraud, or coercion, or a federal crime of terrorism; or involves a minor victim or a controlled substance, firearm, explosive, or destructive device[3]
- the weight of the evidence against the person[4]
- the history and characteristics of the person,[5] including the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings,[6] and whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of a sentence for an offense under federal, state, or local law[7]
- the nature and seriousness of the danger to any person or the community that would be posed by the person's release[8]

Of these factors, the weight of the evidence is the least important.[9]

Caution:

Under some authority, the weight of the evidence against a defendant, as a factor for determining whether a defendant should be released on bail pending trial, goes to the weight of the evidence of dangerousness, not the weight of the evidence of the defendant's guilt.[10] Similarly, it has been said that the strength of the evidence is considered in terms of that evidence's bearing on the risk of nonappearance and the risk of harm to the community, and that the likelihood of conviction by itself has no bearing on the pretrial release decision.[11] However, there is also authority applying the factor in relation to the evidence of guilt.[12]

CUMULATIVE SUPPLEMENT

Cases:

Individualized evaluation required by Bail Reform Act did not include consideration of immigration detainer or possibility that defendant, who had been charged with one count of being removed alien found in United States, if released from criminal custody, would be held in immigration custody; immigration status was not articulated factor under Bail Reform Act, and detention of criminal defendant pending trial pursuant to Bail Reform Act and detention of removable alien pursuant to Immigration and Nationality Act were separate functions that served separate purposes and were performed by different authorities. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(a); 18 U.S.C.A. §§ 3142(e)(1), 3142(g). United States v. Diaz-Hernandez, 943 F.3d 1196 (9th Cir. 2019).

Defendant's violation of six-year term of probation for sex offenses against a minor, as factor relating to defendant's history and characteristics, weighed against finding under Bail Reform Act that conditions of release would reasonably assure the safety of the community, in prosecution for narcotics distribution conspiracy and substantive narcotics-distribution offenses; defendant violated probation by associating with a wanted fugitive, and while allegation that defendant violated probation by possessing two firearms was dropped because defendant stated that the firearms belonged to his father, defendant's statement demonstrated his longstanding access to firearms. 18 U.S.C.A. § 3142(g)(3)(A). United States v. Ingram, 415 F. Supp. 3d 1072 (N.D. Fla. 2019).

Nationwide outbreak of corona virus and defendant's status as 60-year-old, diabetic offender did not provide a compelling reason for defendant's temporary release from the pretrial detention that had been ordered based not only on his status as both a flight risk, with no ties to the community and a history of having previously absconded, but as a violent offender who had engaged in multiple armed bank robberies and posed danger to the community; only alternative to confinement in correctional facility for violent offender like defendant was placement in half-way house, where defendant would face similar risks from corona virus. 18 U.S.C.A. § 3142(i). United States v. Cox, 449 F. Supp. 3d 958 (D. Nev. 2020).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3142(g)(1).
The Bail Reform Act's factor governing the nature and circumstances of the charged offenses favored pretrial detention, in defendant's prosecution for unlawful possession of a firearm and ammunition by a convicted felon, unlawful possession with intent to distribute marijuana, and using, carrying, and possessing a firearm during a drug trafficking offense, where the indictment and the government's proffer established probable cause to believe that defendant engaged in a drug trafficking offense while carrying a loaded firearm; the grand jury found that the amount of recovered marijuana, and presumably the packaging, was consistent with intent to distribute the drug; and the charge of possessing a firearm during a drug trafficking offense carried a mandatory minimum term of five years' imprisonment. United States v. Wills, 311 F. Supp. 3d 144 (D.D.C. 2018).

2 § 36.

3 18 U.S.C.A. § 3142(g)(1).

4 18 U.S.C.A. § 3142(g)(2).

5 18 U.S.C.A. § 3142(g)(3).

6 18 U.S.C.A. § 3142(g)(3)(A).
Defendant's history and characteristics weighed slightly in favor of releasing him on bail pending trial for conspiracy to levy war or to oppose by force the authority of the United States government and related offenses, where defendant had no criminal history, he had no physical or mental health problems, the results of his drug test were negative, he was married to a codefendant and was the father of four adult children, and he was employed as a forklift driver. U.S. v. Stone, 608 F.3d 939 (6th Cir. 2010).
Although the Bail Reform Act's factor addressing the history and characteristics of the defendant did not weigh heavily in favor of pretrial detention, the factor did not rebut the presumption of dangerousness if the presumption applied and did not supply any grounds to be particularly comfortable about defendant's release, and thus the factor did not preclude pretrial detention in a prosecution for Hobbs Act robbery, where defendant had a spotty record of appearing for court dates, defendant had been arrested for possession of a controlled substance, defendant's connection to violence, though short-lived, was significant enough to make him dangerous, and defendant had been residing in his current residence for only three months. United States v. Lee, 206 F. Supp. 3d 103 (D.D.C. 2016).

7 18 U.S.C.A. § 3142(g)(3)(B).

8 18 U.S.C.A. § 3142(g)(4).
The factor regarding danger posed to the community by defendant's release weighed in favor of detention without bail pending trial in a prosecution for attempted production of child pornography and attempted possession of child pornography where, in a letter to the court, defendant's stepdaughter, the alleged victim, expressed fear that she would not be safe if defendant were released; letters defendant offered in support of his release did not reflect any understanding of what defendant was charged with; and, if the jury were to accept the government's version of the facts, defendant would not have complied with his responsibilities, would have shown lack of discipline, and would have hurt a minor and the minor's mother. United States v. Vargas-Reyes, 220 F. Supp. 3d 221 (D.P.R. 2016), aff'd and aff'd.
The court could consider statements made by defendant indicating a violent intent toward his girlfriend as evidence of the defendant's dangerousness when determining whether to release defendant on bail pending trial for conspiracy to levy war or to oppose by force the authority of the United States government and related offenses, even though the statements did not relate to the offenses charged. U.S. v. Stone, 608 F.3d 939 (6th Cir. 2010).

9 U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).

10 U.S. v. Stone, 608 F.3d 939 (6th Cir. 2010).
The Bail Reform Act's factor addressing weight of the evidence of defendant's dangerousness favored pretrial detention, where the government's evidence indicated that defendant was a full participant in a violent and dangerous armed robbery, which placed several innocent victims at risk and involved two weapons, and there was evidence linking defendant to other robberies. United States v. Lee, 206 F. Supp. 3d 103 (D.D.C. 2016).

11 United States v. Lizardi-Maldonado, 275 F. Supp. 3d 1284 (D. Utah 2017).

12 United States v. Vargas-Reyes, 220 F. Supp. 3d 221 (D.P.R. 2016), aff'd and aff'd (defendant's 16-year old stepdaughter asserted that she saw defendant's cell phone taking pictures of her through a transom window over the bathroom door as she exited the shower and further saw the phone taking pictures in her bedroom through another transom window as she changed, the stepdaughter identified the cell phone as defendant's, metadata from the phone suggested that defendant had been taking pictures for six months, and there was no evidence inconsistent with a finding of guilt).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

A. Overview

2. Federal Courts

§ 36. Information considered by federal courts in deciding whether conditions of release will assure defendant's appearance and safety of others—Nature of crime; crime of violence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

For the purpose of considering whether a crime is a "crime of violence"—one of the factors considered when determining whether detention is allowed[1]—the term means an offense that has an element of use, attempted use, or threatened use of physical force against the person or property of another; any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or any felony under the criminal code provisions pertaining to peonage, slavery and trafficking of persons, sexual abuse, sexual exploitation or other abuse of children, and transportation for illegal sexual activity and related crimes.[2] Crimes of violence include aiding and abetting the commission of such a crime, as well as conspiracy to commit it.[3] Thus, a defendant charged with racketeering conspiracy based on leading an organization engaged in extortion was charged with a crime of violence, as would permit his pretrial detention without bail, even though he was not named in a predicate act charge in the indictment, since the Bail Reform Act does not require that the accused personally committed the acts of physical violence.[4]

Although possession of a firearm by a felon is not a crime of violence, the government was entitled to have the defendant detained without bail based on other factors.[5]

Considering the nature of the offense charged in determining whether pretrial bail should be allowed does not violate the Eighth Amendment's injunction against excessive bail.[6]

CUMULATIVE SUPPLEMENT

Cases:

Defendant who had pleaded guilty to possession with intent to distribute cocaine failed to show exceptional reason required for release pending sentencing, although defendant asserted that he was not a flight risk or danger to community and that his continued detention could cause him to serve more jail time than court might impose; defendant committed instant offense while on federal supervision, demonstrating his propensity to engage in illicit conduct while under court-ordered conditions, and defendant's contention that sentence within guidelines range of 30-37 months' imprisonment would effectively be time-served sentence if imposed was based solely on speculation that he would be sentenced at low end of range, receive good conduct time, and be sentenced to a halfway house. 18 U.S.C.A. §§ 3143(a)(1), 3143(a)(2), 3145(c). United States v. Porter, 442 F. Supp. 3d 903 (W.D. Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3142(g)(1).

2 18 U.S.C.A. § 3156(a)(4) (referring to felonies under 18 U.S.C.A. §§ 1581 to 1597; 18 U.S.C.A. §§ 2241 to 2248; 18 U.S.C.A. §§ 2251 to 2260a or 18 U.S.C.A. §§ 2421 to 2428).
The charge against the defendant of communicating a threat in interstate commerce qualified as a "crime of violence," warranting detention under the Bail Reform Act. U.S. v. Choudhry, 941 F. Supp. 2d 347 (E.D. N.Y. 2013).

3 U.S. v. Mitchell, 23 F.3d 1 (1st Cir. 1994); U.S. v. Elder, 88 F.3d 127 (2d Cir. 1996).

4 U.S. v. Ciccone, 312 F.3d 535 (2d Cir. 2002).

5 U.S. v. Powell, 813 F. Supp. 903 (D. Mass. 1992).

6 U.S. v. Kostadinov, 721 F.2d 411 (2d Cir. 1983).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

B. After Conviction or Pending Appeal

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44

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A.L.R. Index, Bail and Recognizance
A.L.R. Index, Federal Bail Reform Act
West's A.L.R. Digest, Bail 42, 44

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

B. After Conviction or Pending Appeal

1. State Courts

§ 37. Right to bail, and particular factors affecting right to or granting of bail or recognizance after conviction or pending appeal in state courts, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44

A.L.R. Library

Right of defendant in state court to bail pending appeal from conviction—modern cases, 28 A.L.R.4th 227
Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385

Under some authority, a state constitutional right to bail is extinguished upon conviction, meaning a finding of guilt, accepted by the court.[1] After conviction, release on bond pending sentencing is not a matter of right, but is discretionary with the court.[2]

The issues relating to bail following a criminal conviction differ from those relating to pretrial release, primarily dealing with such concerns as the increased flight risk.[3] The grant or denial of bail pending appeal depends on the circumstances of each particular case where the matter is within the court's discretion.[4] Statutes[5] or rules of criminal procedure[6] may specify the factors to be considered. One of the factors, or potential grounds for denial of bail, is whether the defendant, if released on bail pending appeal, would pose a danger to others or to the community;[7] while a judge may not consider a defendant's alleged dangerousness in setting the amount of bail, as using unattainable bail to detain a defendant because he or she is dangerous is improper, a defendant's dangerousness may be considered as a factor in setting other conditions of release.[8] A finding that a

defendant is a flight risk may mandate[9] or warrant[10] the denial of an appeal bond, considering such factors as that the defendant had no ties to the community, and faced a lengthy prison sentence,[11] or initially attempted to evade arrest.[12]

The possibility of obstruction of justice or interference with the administration of justice has also been recognized as a distinct element, which courts should consider in deciding whether a convicted defendant should be granted bail pending appeal in those cases where bail is discretionary.[13] It has been said that a trial court should not grant bond pending appeal unless a defendant sufficiently convinces the court that there is no substantial risk that he or she will intimidate witnesses or otherwise interfere with the administration of justice.[14]

The merits of the appeal are properly considered.[15] A court should consider the probability of reversal,[16] and should not allow bail where it appears that the errors assigned are frivolous, the appeal was taken merely for delay, or there is no reasonable ground or probable cause for the appeal.[17]

The defendant's prior conduct may also be considered.[18] Thus, for example, forfeiture of bail bonds in prior matters or criminal conduct while at large on bail is a ground for refusing to grant bail after conviction.[19] Bail may also be denied where the defendant admitted that he had continued operating a business during the trial, despite having previously pled guilty to securities violations and being directed to cease and desist offering securities for sale in the state.[20] However, past criminal history is not necessarily a reason to compel further detention pending an interlocutory appeal by the state.[21]

Bail may be allowed after conviction where it is shown that the petitioner is in poor health and his or her life would be endangered by confinement.[22]

An accused found not guilty on ground of insanity did not have the right to be admitted to bail pending an appeal, where the court rules applied only to appeals from a sentence, and there was no “sentence” in the case.[23]

A requirement that nonindigent defendants post bond to be released pending an appeal by the state from an order granting the suppression of evidence does not constitute a denial of equal protection.[24]

Caution:

A "hammer clause" provision in a plea agreement, in lieu of bail, allows the defendant, after entry of his guilty plea, to remain out of jail pending final sentencing.[25]

CUMULATIVE SUPPLEMENT

Cases:

The trial court's denial of defendant's request for bail, after defendant's convictions for possession of cocaine and synthetic cannabinoid with intent to distribute and while his appeal was pending, was not an abuse of discretion; the trial court found defendant was a repeat offender of the crimes for which he had been convicted. Miss. Code Ann. § 99-35-115. Fairley v. State, 275 So. 3d 1012 (Miss. 2019).

[END OF SUPPLEMENT]

Footnotes

1 State v. Patel, 327 Conn. 932, 171 A.3d 1037 (2017).

2 Kraft v. State, 156 So. 3d 1116 (Fla. 4th DCA 2015); Johnson v. State, 194 So. 3d 191 (Miss. Ct. App. 2016).

3 McGlade v. State, 941 So. 2d 1185 (Fla. 2d DCA 2006).

4 Bigley v. Warden, Md. Correctional Institution for Women, 16 Md. App. 1, 294 A.2d 141 (1972); In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004) (defendant's character and circumstances); State ex rel. Burford v. McKee, 135 W. Va. 18, 62 S.E.2d 281, 23 A.L.R.2d 798 (1950).
The courts should proceed with caution and grant bail pending appeal only where the peculiar circumstances of the case render it proper. State v. Iverson, 76 Idaho 117, 278 P.2d 205 (1954).

5 Jones v. State, 905 So. 2d 644 (Miss. Ct. App. 2004), judgment rev'd on other grounds, 904 So. 2d 149 (Miss. 2005) (trial court erred in granting bail pending appeal, without addressing statutory requirements).

6 State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985).

7 Kraft v. State, 156 So. 3d 1116 (Fla. 4th DCA 2015); People v. Beaty, 351 Ill. App. 3d 717, 286 Ill. Dec. 602, 814 N.E.2d 590 (5th Dist. 2004); Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005); Lane v. State, 98 Nev. 458, 652 P.2d 1174 (1982) (overruled on other grounds by, Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004)); State v. Keaton, 61 N.C. App. 279, 300 S.E.2d 471 (1983); State v. Engel, 284 N.W.2d 303 (N.D. 1979); Liberatore v. McKeen, 63 Ohio St. 2d 175, 17 Ohio Op. 3d 107, 407 N.E.2d 23 (1980) (overruled on other grounds by, Dapice v. Stickrath, 40 Ohio St. 3d 298, 533 N.E.2d 339 (1988)); Matter of Champeau, 1982 OK CR 33, 643 P.2d 326 (Okla. Crim. App. 1982); State v. Burgers, 1999 SD 140, 602 N.W.2d 277 (S.D. 1999).

8 Brangan v. Commonwealth, 477 Mass. 691, 80 N.E.3d 949 (2017).
Prohibition of excessive bail and limitation of bail amount to that required to ensure defendant's appearance, see §§ 87, 88.

9 People v. Gurule, 174 P.3d 846 (Colo. App. 2007).

10 People v. Beaty, 351 Ill. App. 3d 717, 286 Ill. Dec. 602, 814 N.E.2d 590 (5th Dist. 2004); Small v. Hooks, 151 Ohio St. 3d 535, 2017-Ohio-8724, 90 N.E.3d 921 (2017); In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004) (possibility of escape considered); State v. Burgers, 1999 SD 140, 602 N.W.2d 277 (S.D. 1999).

11 King v. State, 268 Ga. App. 811, 603 S.E.2d 88 (2004).

12 State v. Smiley, 2004 SD 119, 689 N.W.2d 427 (S.D. 2004).

13 Dollar v. State, 909 So. 2d 399 (Fla. 5th DCA 2005) (intimidation of victims); Smiley v. State, 164 Ga. App. 12, 296 S.E.2d 209 (1982); State v. Marini, 117 N.H. 71, 369 A.2d 202 (1977).

14 Pressel v. State, 161 Ga. App. 488, 287 S.E.2d 780 (1982).

15 Mulford v. State, 408 So. 2d 836 (Fla. 4th DCA 1982); Smiley v. State, 164 Ga. App. 12, 296 S.E.2d 209 (1982); State v. Kerrigan, 98 Idaho 701, 571 P.2d 762 (1977); Com. v. Wright, 11 Mass. App. Ct. 276, 415 N.E.2d 870 (1981); Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004) (recognizing that the nature and quality of the alleged errors may raise serious concerns respecting the validity of a conviction and weigh heavily in favor of granting bail pending review, but finding that there was no showing that alleged errors eroded or undermined the validity of the conviction and sentence); People v. Vasquez, 88 A.D.2d 667, 450 N.Y.S.2d 606 (2d Dep't 1982).

16 In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004).

17 Luke v. State, 282 Ga. App. 749, 639 S.E.2d 645 (2006); Nichols v. Patterson, 202 S.C. 352, 25 S.E.2d 155 (1943); State ex rel. Burford v. McKee, 135 W. Va. 18, 62 S.E.2d 281, 23 A.L.R.2d 798 (1950).

18 State ex rel. Burford v. McKee, 135 W. Va. 18, 62 S.E.2d 281, 23 A.L.R.2d 798 (1950).

19 State ex rel. Burford v. McKee, 135 W. Va. 18, 62 S.E.2d 281, 23 A.L.R.2d 798 (1950).

20 Branan v. State, 285 Ga. App. 717, 647 S.E.2d 606 (2007).

21 People v. Beaty, 351 Ill. App. 3d 717, 286 Ill. Dec. 602, 814 N.E.2d 590 (5th Dist. 2004).

22 Ex parte McIntosh, 88 Okla. Crim. 162, 201 P.2d 258 (1948).

23 State v. Marzbanian, 2 Conn. Cir. Ct. 312, 198 A.2d 721 (App. Div. 1963).

24 State v. Shipman, 360 So. 2d 782 (Fla. 4th DCA 1978).

25 Webster v. Com., 438 S.W.3d 321 (Ky. 2014).

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8A Am. Jur. 2d Bail and Recognizance § 38

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B. After Conviction or Pending Appeal

1. State Courts

§ 38. Type or seriousness of offense and severity of punishment as factors affecting right to or granting of bail or recognizance after conviction or pending appeal in state courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44

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Right of defendant in state court to bail pending appeal from conviction—modern cases, 28 A.L.R.4th 227

Courts have sometimes taken into account the seriousness of the crimes of which the defendant had been convicted[1] in determining that the defendant should be denied release on bail after conviction or pending appeal.[2] Furthermore, courts do not always have the discretion to grant bail to defendants pending appeal of a conviction of certain serious crimes, or crimes for which severe sentences have been imposed, but may be required to hold defendants in custody pending their appeals.[3] A court may also revoke pretrial bail on a conviction for an offense that carries a minimum mandatory sentence.[4] Conversely, in some jurisdictions, following a conviction for certain less serious crimes or the imposition of less severe sentences, bail pending appeal is a matter of right rather than of the court's discretion.[5]

Statutes sometimes authorize bail for persons convicted of certain offenses, but not for others.[6] Constitutional due process and equal protection claims raised concerning statutes authorizing bail for certain types of felonies after conviction, but not others, have generally been rejected.[7]

The imposition of an upward departure sentence does not necessarily prevent granting bond pending appeal, since the appropriateness of an appeal bond is not related to whether there was a substantial and compelling reason for departing from the presumptive sentence.[8]

Footnotes

1 In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004).

2 State v. Ramos, 378 So. 2d 894 (Fla. 1st DCA 1979) (felony drug offenses, where there was probable cause to believe that the defendant was guilty of attempted first-degree murder); Bergna v. State, 120 Nev. 869, 102 P.3d 549 (2004) (defendant planned and committed a particularly violent, premeditated murder, under circumstances designed to escape detection); People v. Laezza, 143 A.D.2d 424, 533 N.Y.S.2d 3 (2d Dep't 1988) (criminally negligent homicide and assault resulting from an automobile collision, which could not be characterized as only a tragic accident); State v. Janklow, 2004 SD 36, 678 N.W.2d 189 (S.D. 2004) (failure to stop at a stop sign, speeding, reckless driving, and second degree manslaughter, where a death occurred).

3 Barts v. State, 447 So. 2d 410 (Fla. 1st DCA 1984) (those convicted of first-degree felonies involving murder, kidnapping, sexual battery and arson); Rowe v. State, 417 So. 2d 981 (Fla. 1982) (offenses punishable by death, regardless of whether the death penalty was imposed); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); Vacendak v. State, 431 N.E.2d 100 (Ind. 1982) ("nonsuspendable offenses," apparently including armed burglary); Fredette v. State, 428 A.2d 395 (Me. 1981) (offenses that were at some point punishable by death); Petition of Hamel, 137 N.H. 488, 629 A.2d 802 (1993); People v. Vasquez, 88 A.D.2d 667, 450 N.Y.S.2d 606 (2d Dep't 1982) (Class A felony convictions, but only where a felony sentence is actually imposed); Spitznas v. State, 1982 OK CR 115, 648 P.2d 1271 (Okla. Crim. App. 1982) (variety of specific crimes); Daniel v. State, 623 S.W.2d 411 (Tex. Crim. App. 1981) (punishment exceeding 15 years' confinement).

While defendant's murder case came within the exception clause of statute that allowed for an accused to be released on reasonable bail pending the disposition of an appeal, except in cases punishable by death, the statute did not absolutely prohibit bail, and thus, whether or not to grant bail pending appeal would be left to the sound discretion of the trial court. Johnson v. State, 304 Ga. 369, 818 S.E.2d 601 (2018).

4 Felix v. State, 905 A.2d 746 (Del. 2006) (driving under the influence of alcohol; the trial judge noted that this was standard practice).

5 State v. James, 849 So. 2d 574 (La. Ct. App. 1st Cir. 2003) (where a sentence of five years or less is actually imposed; the court otherwise has discretion, such as where a 10-year sentence was imposed for aggravated incest, even though half of the sentence was suspended); Bumphis v. State, 405 So. 2d 116 (Miss. 1981) (any offense other than treason, murder, rape, arson, burglary, or robbery); Spitznas v. State, 1982 OK CR 115, 648 P.2d 1271 (Okla. Crim. App. 1982) (conviction of misdemeanor, or in felony cases where punishment is fine only); State v. Smith, 100 Wis. 2d 317, 302 N.W.2d 54 (Ct. App. 1981) (overruled on other grounds by, State v. Firkus, 119 Wis. 2d 154, 350 N.W.2d 82 (1984)) (misdemeanor convictions).

6 Stiegele v. State, 685 P.2d 1255 (Alaska Ct. App. 1984); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); State v. Stradt, 556 N.W.2d 149 (Iowa 1996) (forcible felonies and other serious crimes excepted); State v. Maples, 445 So. 2d 540 (Miss. 1984); Petition of Hamel, 137 N.H. 488, 629 A.2d 802 (1993).

7 Stiegele v. State, 685 P.2d 1255 (Alaska Ct. App. 1984); Petition of Hamel, 137 N.H. 488, 629 A.2d 802 (1993).

8 State v. Martinez, 38 Kan. App. 2d 324, 165 P.3d 1050 (2007).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

B. After Conviction or Pending Appeal

2. Federal Courts

§ 39. Factors affecting right to or granting of bail or recognizance pending sentencing in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42

A convicted defendant does not have a constitutional right to bail.[1] While usually a person who has been found guilty of an offense and who is awaiting imposition or execution of the sentence must be detained,[2] if the judicial officer makes a finding, by clear and convincing evidence,[3] that the person is not likely to flee or pose a danger to the safety of any other person or the community if released, the judicial officer must order the release of the person in accordance with the applicable provisions.[4] The judicial officer must also order that a person who has been found guilty of certain specified types of offenses requiring a detention hearing be detained[5] unless the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted,[6] or an attorney for the government has recommended that no sentence of imprisonment be imposed on the person,[7] and the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.[8]

Observation:

Even though a guilty verdict greatly reduces a defendant's expectation in continued liberty, it does not extinguish that interest; a sufficient liberty interest in continued release is conferred on a defendant awaiting sentencing by the described statute, on satisfaction of the specified conditions, to warrant some measure of due process protection.[9]

Preventing danger to the community is a legitimate regulatory goal that may outweigh an individual's liberty interest in obtaining bail after being convicted.[10]

The provision that a person who has been found guilty of certain specified types of offenses be detained unless the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted[11] is similar to the one on bail pending appeal,[12] except there is no need to predict a reversal by another court; the requisite prediction only concerns the judge's own actions.[13]

Footnotes

1 U.S. v. Olis, 450 F.3d 583 (5th Cir. 2006).
2 § 21.
3 § 64.
4 18 U.S.C.A. § 3143(a)(1) (referring to the provisions of 18 U.S.C.A. § 3142(b) or 18 U.S.C.A. § 3142(c)).
5 § 21.
6 18 U.S.C.A. § 3143(a)(2)(A)(i).
7 18 U.S.C.A. § 3143(a)(2)(A)(ii).
8 18 U.S.C.A. § 3143(a)(2)(B).
As to burdens of proof in proceedings concerning bail, generally, see § 61.
9 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).
10 Antonelli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996).
11 18 U.S.C.A. § 3143(a)(2)(A)(i).
12 § 40.
13 U.S. v. McAllister, 974 F.2d 291 (2d Cir. 1992).

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B. After Conviction or Pending Appeal

2. Federal Courts

§ 40. Factors affecting right to or granting of bail or recognizance pending appeal in federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44

A person who has been convicted and has filed an appeal or a petition for a writ of certiorari must be detained,[1] unless the judicial officer finds, by clear and convincing evidence[2] that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under the applicable statutory provisions,[3] and that the appeal is not for the purpose of delay[4] and raises a substantial question of law or fact[5] likely to result in reversal,[6] an order for a new trial,[7] a sentence that does not include a term of imprisonment,[8] or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.[9] A judicial officer who makes these findings must order the person's release, with specified exceptions.[10]

With regard to the requirement that the appeal result in a reduced sentence,[11] an imprisoned person is not to be released pending further proceedings if it is a certainty that however the appeal is resolved, the prisoner will be returned to prison.[12] Thus, there are only three circumstances in which a court may release a defendant pending appeal, where the district court plans not to rely on the sentencing guidelines at all, but to use its discretion to sentence the defendant to a term of imprisonment shorter than the time the defendant is expected to serve pending appeal; the court plans to empanel a sentencing jury to consider the government's evidence in support of increasing the base offense level and believes that the jury will make findings that will preclude a sentence longer than the expected duration of the appeal; or the court intends that there will not be adjustments to the base offense level, and a sentence consistent with that level will expire before the appeal is likely to be resolved.[13]

The provision governing release pending appeal, rather than the provision governing release pending sentencing,[14] applies to a defendant who had been sentenced, incarcerated, had the conviction affirmed, but the sentence vacated on appeal, and awaits resentencing.[15]

Practice Tip:

Even if a judge is not allowed under the Bail Reform Act of 1984 to grant bail pending appeal unless the judge finds that the conviction is likely to be reversed, the defendant is not denied due process, since the defendant can also ask the court of appeals for bail under Fed. R. App. P. 9(b).[16]

Observation:

A person confined pursuant to the statutory provision pertaining to confinement of witnesses who refuses without just cause shown to comply with an order of the court to testify or provide other information[17] may not be admitted to bail pending the determination of an appeal taken by him or her from the confinement order, if it appears that the appeal is frivolous or taken for delay.[18]

Footnotes

1 § 22.
2 § 66.
3 18 U.S.C.A. § 3143(b)(1)(A) (referring to the provisions of 18 U.S.C.A. § 3142(b), (c)).
Bail pending appeal is not warranted where it is concluded, from all the surrounding circumstances, that the risk of continued criminal activity by the defendant is so high that there is a danger to the community. U.S. v. Hawkins, 617 F.2d 59 (5th Cir. 1980).
4 18 U.S.C.A. § 3143(b)(1)(B).
5 § 41.
6 18 U.S.C.A. § 3143(b)(1)(B)(i).
7 18 U.S.C.A. § 3143(b)(1)(B)(ii).
8 18 U.S.C.A. § 3143(b)(1)(B)(iii).
9 18 U.S.C.A. § 3143(b)(1)(B)(iv).
10 18 U.S.C.A. § 3143(b)(1).
11 18 U.S.C.A. § 3143(b)(1)(B)(iv).
12 U.S. v. LaGiglio, 384 F.3d 925 (7th Cir. 2004).
13 U.S. v. LaGiglio, 384 F.3d 925 (7th Cir. 2004).
14 § 39.

15 U.S. v. Olis, 450 F.3d 583 (5th Cir. 2006) (further holding that a defendant whose fraud and conspiracy convictions were affirmed and whose sentence was vacated on appeal was not entitled to bail pending resentencing, where the defendant faced a sentence that was far greater than the time he had already served, even if he were found responsible for only 1% of the estimated loss on which his original sentence was based).

16 U.S. v. Giangrosso, 763 F.2d 849 (7th Cir. 1985).
Fed. R. App. P. 9(b) is generally discussed in Am. Jur. 2d, Appellate Review § 209.

17 28 U.S.C.A. § 1826(a).

18 28 U.S.C.A. § 1826(b).

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III. Particular Factors Affecting Right or Granting of Bail or Recognizance

B. After Conviction or Pending Appeal

2. Federal Courts

§ 41. Factors affecting right to or granting of bail or recognizance pending appeal in federal courts—Requirement of substantial question

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44

A.L.R. Library

What is "a substantial question of law or fact likely to result in reversal or an order for a new trial" pursuant to 18 U.S.C.A. sec. 3143(b)(2) respecting bail pending appeal, 79 A.L.R. Fed. 673

A defendant seeking release on bond pending an appeal must establish, under the Bail Reform Act,[1] that the appeal raises a substantial question of law or fact[2] likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.[3] Thus, a motion for bond pending appeal will be denied where the defendant fails to demonstrate that the appeal raises substantial questions of law.[4]

It has been said that a "substantial question" for this purpose is one that is fairly doubtful or debatable,[5] and must be more than merely not frivolous.[6] While a showing that the defendant would probably win is not required,[7] an appeal raises a "substantial question," if it presents a close question or one that very well could be decided the other way,[8] and the appellate courts require a showing that the appeal presents a "close question"—not simply that reasonable judges could differ—on a question so integral

to the merits of the conviction that reversal or a new trial will occur if the question is decided in the defendant's favor.[9] A novel question may be substantial, unless it is plainly meritless or easily resolved from other circuits' case law,[10] although it has also been said that the issue must be significant in addition to being novel.[11]

Footnotes

1 § 40.

2 18 U.S.C.A. § 3143(b)(1)(B).

3 § 40.

4 U.S. v. Laetividal-Gonzalez, 939 F.2d 1455 (11th Cir. 1991).
On appeal of his conviction for the transportation and possession of child pornography, defendant would not present a substantial question of law or fact concerning the district court's denial without holding an evidentiary hearing of his motion to suppress evidence obtained from his computer pursuant to a search warrant, and thus he was not entitled to release pending appeal; although the constitutionality of searches of electronically stored data was a controversial and developing topic, defendant did not present the court with a sufficient evidentiary record to place this constitutional question into play, but instead merely insisted that the protocols the police used to search his computer were too broad and that a more targeted search was not merely technologically possible but constitutionally mandated. U.S. v. Farlow, 824 F. Supp. 2d 189 (D. Me. 2011).

5 Hoye v. Meek, 795 F.2d 893 (10th Cir. 1986).
The issue of whether juror misconduct occurred was a substantial issue of fact as required for defendant to be entitled to release from custody pending appeal; the question of whether juror misconduct occurred was close enough to warrant some investigation and the close question could not be resolved until the investigation took place. United States v. Zimny, 857 F.3d 97 (1st Cir. 2017).
Defendant's double jeopardy claim did not present a substantial question, as would support defendant's claim for release on bail pending appeal of her conviction for tax evasion, where the court of appeals had already explicitly considered and rejected her double jeopardy argument. U.S. v. Farr, 457 Fed. Appx. 757 (10th Cir. 2012).

6 U.S. v. Miller, 730 F. Supp. 1207 (N.D. N.Y. 1990).

7 U.S. v. Schwartz, 86 F. Supp. 3d 25 (D. Mass. 2015).

8 U.S. v. Eaken, 995 F.2d 740 (7th Cir. 1993); U.S. v. Powell, 761 F.2d 1227, 79 A.L.R. Fed. 649 (8th Cir. 1985) (rejected on other grounds by, U.S. v. Smith, 793 F.2d 85 (3d Cir. 1986)) (and thus the defendant need not show that it is likely or probable that he or she will prevail on the issue on appeal); U.S. v. Perholtz, 836 F.2d 554 (D.C. Cir. 1987); U.S. v. Rausch, 746 F. Supp. 2d 1192 (D. Colo. 2010); U.S. v. Schwartz, 86 F. Supp. 3d 25 (D. Mass. 2015).
The exclusion of expert testimony that the defendant was unable to form the requisite mens rea to commit the crime did not present a substantial question of law for appeal, as required by the Bail Reform Act for release pending appeal, given the unlikelihood that an appellate court would find that the evidentiary ruling was an abuse of discretion, where any relevance of the proffered testimony was significantly outweighed by its lack of reliability and potential to confuse the jury. U.S. v. Day, 433 F. Supp. 2d 54 (D.D.C. 2006).

9 U.S. v. Marshall, 78 F.3d 365 (8th Cir. 1996).

10 U.S. v. Jackson, 876 F. Supp. 1221 (D. Kan. 1994).

11 U.S. v. Smith, 793 F.2d 85 (3d Cir. 1986).

8A Am. Jur. 2d Bail and Recognizance IV Refs.

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IV. Conditions of Release

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 42.5, 44(1)

A.L.R. Library

A.L.R. Index, Bail and Recognizance
A.L.R. Index, Federal Bail Reform Act
West's A.L.R. Digest, Bail 42.5, 44(1)

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8A Am. Jur. 2d Bail and Recognizance § 42

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IV. Conditions of Release

§ 42. Conditions of release on bail, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42.5, 44(1)

Forms

Forms relating to conditions of release, see Am. Jur. Pleading and Practice Forms, Criminal Procedure; Am. Jur. Pleading and Practice Forms, Federal Criminal Procedure; Federal Procedural Forms, Criminal Procedure [Westlaw®(r) Search Query]

Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court.[1]

A trial judge normally has the authority to impose on a defendant's bail any condition that the judge believes necessary to preserve public safety and to assure that the defendant will return to court at the appointed time.[2] The right to release before trial is conditioned on the accused giving adequate assurance that he or she will stand trial and submit to the judgment if found guilty.[3] Once a judicial officer makes the decision to release a defendant, i.e., admit the defendant to bail, regulation of pretrial release is not prohibited unless the conditions of release are excessive compared against the governmental interest sought to be protected; an individual's strong interest in liberty may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society.[4] A court may have the inherent power to impose conditions, so long as they do not impinge constitutional rights,[5] or statutes sometimes specifically require that conditions that will reasonably ensure the defendant's appearance and ensure the integrity of the judicial process must be imposed.[6] A statute may also provide that a defendant whose guilt has been established and is either awaiting sentence or has filed an appeal from the judgment may be

ordered released on conditions.[7] Even a defendant released on nominal bail under a speedy trial rule is subject to the usual conditions of bail.[8]

The serious nature of the allegations, and a defendant's proven unwillingness to follow the law, may be considered in setting bail and fixing the conditions of pretrial release.[9] Under some rules, an order of release may include placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant, if the potential custodian agrees.[10] Under appropriate circumstances, it may be lawful to impose as a pretrial release condition a requirement that an arrestee pay for private armed security guards to be stationed outside of his or her residence to ensure the arrestee's compliance with home confinement.[11]

While a defendant is released on bail prior to trial, a trial court retains jurisdiction over the conditions of release, and possesses the inherent authority to exact obedience.[12] Conditions are separate, coercive powers, separate from the bond itself, and are enforceable by immediate arrest, revocation, or modification, if violated.[13] So long as the conditions of release are pertinent to the offense charged and to assuring the defendant's presence, nothing prohibits the defendant from agreeing to the forfeiture of bail for a violation of a condition on pretrial release.[14] Accordingly, statutes may require that, at the time of release, the defendant must be notified in writing of the specified statutory and any additional conditions of release, and the consequences of violating them.[15]

A pretrial services program may exceed its authority by imposing bail conditions that were not statutorily mandated or previously ordered by the court.[16]

Caution:

A defendant's objections to the conditions of bail are too late after the defendant was charged with violating them, where other means were available to challenge them.[17]

Bonds may be used to impose certain nonfinancial conditions to control the defendant's behavior while on pretrial release[18] or release pending appeal.[19] There may be a statutory presumption in favor of release on nonmonetary conditions for any person granted pretrial release.[20] The defendant is not to be discharged outright, but must be released on recognizance subject to the condition that he or she appear at all court proceedings, or released under a summons to appear before the appropriate court at a time certain.[21]

In imposing bail, a prohibition from possession of firearms is not an unreasonable restriction on liberty.[22] However, while a court may consider public safety concerns,[23] it may not impose onerous or unconstitutional provisions on a defendant released on personal recognizance, where lesser conditions are available to ensure that the public is protected against potential violent acts.[24]

CUMULATIVE SUPPLEMENT

Cases:

Imposition of requirement that defendant waive his Fourth Amendment rights as a condition of his release on bond reasonably balanced defendant's Fourth Amendment rights against public safety interests, and, thus, waiver was not unreasonable bail condition, where defendant was charged with multiple offenses including felony theft by receiving stolen property. U.S. Const. Amend. 4. Watson v. State, 356 Ga. App. 360, 847 S.E.2d 207 (2020).

To prevail on a claim that home confinement as a condition of release during a stay of sentence pending resolution of a motion for a new trial is a seizure under the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights, the defendant first must establish that the constitutional prohibitions against unreasonable seizures apply during a postconviction stay of sentence. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14. Garcia v. Commonwealth, 486 Mass. 341, 158 N.E.3d 452 (2020).

Imposition of GPS monitoring requirement on defendant as a condition of pretrial release did not advance permissible goals of bail statute, including ensuring defendant's return to court and his presence at trial and safeguarding the integrity of judicial process by protecting witnesses from intimidation and other influence, and thus GPS monitoring did not further any legitimate governmental interests and violated state constitutional prohibition against unreasonable searches and seizures; causal link between government tracking and additional incentive to appear in court was too attenuated and speculative to justify GPS monitoring, and there was no indication that monitoring was intended to insulate any particular victims or witnesses. Mass. Const. pt. 1, art. 14; Mass. Gen. Laws Ann. ch. 276, § 58. Commonwealth v. Norman, 484 Mass. 330, 142 N.E.3d 1 (2020).

Requiring defendant to participate in pretrial release program as condition of temporary order of protection that was itself condition of defendant's release before trial on domestic violence charges was warranted in order to protect alleged victim, who was defendant's grandmother, where pretrial release program would enhance likelihood defendant would abide by other conditions of temporary order, including by staying away from grandmother's home where he had been residing, by providing him with access to services regarding employment, counseling, and housing and by reviewing his obligations under temporary order at each court-ordered check-in, and risk of additional legal sanction from potential violation of temporary order was justified in order to protect complainant and public. N.Y. CPL §§ 530.11, 530.12, 530.13. People v. Soto, 66 Misc. 3d 827, 119 N.Y.S.3d 22 (N.Y. City Crim. Ct. 2020).

[END OF SUPPLEMENT]

Footnotes

1 State v. Brown, 2014-NMSC-038, 338 P.3d 1276 (N.M. 2014).

2 Ex parte Phelps, 612 So. 2d 1177 (Ala. 1992).
Once a defendant has been convicted of the felony charged, the trial court may prescribe the conditions of bond, if one is set. State v. Dawn, 246 Neb. 384, 519 N.W.2d 249 (1994).

3 Hernandez v. Lynch, 216 Ariz. 469, 167 P.3d 1264 (Ct. App. Div. 1 2007); Pelekai v. White, 75 Haw. 357, 861 P.2d 1205 (1993).

4 United States v. Campbell, 309 F. Supp. 3d 738 (D.S.D. 2018).
Defendant's due process rights were not violated during a bond revocation hearing when the court denied the state's motion to revoke bond but imposed special conditions to the existing bond, including conditions that defendant not access the internet by any means, that he not possess any images depicting a child under 18 years of age, and that he not possess any device capable of accessing the internet; defendant was not deprived of his freedom by incarceration, defendant had a full and fair opportunity to be heard before his

bond was modified, and the conditions of the bond detailed by the court at the revocation hearing merely reflected and clarified the preventative nature of the special conditions of the original bond order in light of new evidence regarding defendant's conduct. Edvalson v. State, 298 Ga. 626, 783 S.E.2d 603 (2016).

5 Burson v. State, 202 S.W.3d 423 (Tex. App. Tyler 2006).

6 State v. Pettengill, 635 A.2d 1309 (Me. 1994).

7 State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901 (2004) (statute applies to a defendant whose probation was stayed pending appeal, to assure court supervision of the defendant).

8 Com. v. Sloan, 589 Pa. 15, 907 A.2d 460 (2006).

9 Miller v. Eleventh Judicial Dist. Court, 2007 MT 58, 336 Mont. 207, 154 P.3d 1186 (2007).

10 Ex parte Phelps, 612 So. 2d 1177 (Ala. 1992).

11 United States v. Esposito, 2018 WL 4344332 (2d Cir. 2018) (the arrestee had a net worth exceeding $13 million and was a flight risk, and the arrestee posed a danger to the community as he was an alleged member of the "mob").

12 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992).

13 State v. Rivera, 133 N.M. 571, 2003-NMCA-059, 66 P.3d 344 (Ct. App. 2003), rev'd on other grounds, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939 (2003).

14 State v. Dillon, 529 N.W.2d 387 (Minn. Ct. App. 1995).

As to forfeiture, generally, see §§ 127 to 140.

15 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992).

As to the requirement that the conditions be stated in a federal release order, see § 57.

16 People v. Rickman, 178 P.3d 1202 (Colo. 2008).

17 State v. Felch, 2007 ME 88, 928 A.2d 1252 (Me. 2007).

18 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992) (conditions authorized by statute); Clemons v. Com., 152 S.W.3d 256 (Ky. Ct. App. 2004).

A rule of criminal procedure governing conditions of pretrial release was constitutional, since it assured that defendants would be given the choice of bail by sufficient sureties without conditions if release on nonmonetary conditions was ordered, although a court abuses its discretion when it sets monetary bail for the sole reason of pressuring a defendant to accept conditions. State v. Martin, 743 N.W.2d 261 (Minn. 2008).

As to particular restrictions on conduct, see § 43.

19 Morgan v. State, 285 Ga. App. 254, 645 S.E.2d 745 (2007).

20 State v. Raymond, 906 So. 2d 1045 (Fla. 2005).

21 Evans v. Seagraves, 922 So. 2d 318 (Fla. 1st DCA 2006).

22 United States v. Campbell, 309 F. Supp. 3d 738 (D.S.D. 2018).

23 State v. Martin, 743 N.W.2d 261 (Minn. 2008).

24 Butler v. Kato, 137 Wash. App. 515, 154 P.3d 259 (Div. 1 2007) (holding that conditions that a defendant charged with driving under the influence undergo alcohol evaluation and attend three self-help meetings per week violated the rights of confidentiality and autonomous decision-making, where the state failed to show a compelling governmental interest in requiring pretrial evaluation and treatment or that the conditions were narrowly tailored to be no greater than necessary).

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IV. Conditions of Release

§ 43. Restrictions on conduct as conditions of release on bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42.5, 44(1)

A court, in setting bail, is authorized to impose restrictions on travel, associations, conduct, or place of abode.[1] State rules of criminal procedure also sometimes state the conditions a judicial officer may place on a defendant's bail, if the defendant is determined to be dangerous, such as prohibiting certain contacts or possessing any dangerous weapon.[2]

Statutes sometimes impose as a condition of all pretrial and posttrial releases that the person released not commit a federal, state or local crime during the period of release.[3]

Another typical condition is that the defendant must avoid all contact with a victim of the alleged crime, or with any family or household member of the victim.[4] Some statutes impose a mandatory condition prohibiting persons charged with a crime involving domestic violence from returning to the victim's residence or having contact with the victim.[5] Even where a sentenced misdemeanant has an absolute statutory right to bail, this does not preclude the imposition of conditions prohibiting the defendant from driving or being within a specified distance of places where children are present, although such a "stay-away order" should set defined parameters, using maps, if practicable.[6]

CUMULATIVE SUPPLEMENT

Cases:

GPS monitoring, as a condition of release while sentencing was stayed pending resolution of motion for new trial, while a search, was not unreasonable; the permissible condition of home confinement had already limited the defendant's travels to predetermined locations and times, her status as a convicted felon with an incomplete sentence to serve reduced her privacy interests, partially offsetting the intrusion on her privacy, and there was a legitimate governmental interest to ensure public

safety and the defendant's return to court. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14. Garcia v. Commonwealth, 486 Mass. 341, 158 N.E.3d 452 (2020).

[END OF SUPPLEMENT]

Footnotes

1 State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901 (2004) (also stating that this authority is not limited to persons arrested for crimes for which imprisonment may be imposed).
Release of an illegal reentry defendant with conditions pending trial was warranted, under the Bail Reform Act, in light of the risk that defendant would not return to court based on his lack of legal status in the United States and his family in Mexico; defendant would be released to his daughter-in-law for supervision if she agreed, defendant would live with his daughter-in-law and not travel outside the state without permission, would report to a pretrial officer as directed by the officer, voice recognition location monitoring would be used daily in the home, and defendant would be prohibited from obtaining a passport, driving, and from obtaining employment. United States v. Lizardi-Maldonado, 275 F. Supp. 3d 1284 (D. Utah 2017).

2 Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996).

3 State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992).

4 State v. Pettengill, 635 A.2d 1309 (Me. 1994) (upholding the constitutionality of the use of the term "contact").
A court has the inherent authority to impose on a defendant charged with family violence battery a special bond condition prohibiting contact with the victim. Patel v. State, 283 Ga. App. 181, 641 S.E.2d 184 (2006).
At a minimum, defendants charged with aggravated sexual abuse of a child should be prohibited from having contact with the alleged victim and witnesses and with others under the age of 18 without permission from a pretrial services officer; such conditions are not an unreasonable limitation on the defendant's liberty. United States v. Campbell, 309 F. Supp. 3d 738 (D.S.D. 2018).

5 Williams v. State, 151 P.3d 460 (Alaska Ct. App. 2006) (but finding statute unconstitutionally broad as applied); Pilorge v. State, 876 So. 2d 591 (Fla. 5th DCA 2004) (but finding that there was insufficient evidence that the defendant was informed of this condition).

6 Vaas v. U.S., 852 A.2d 44 (D.C. 2004).

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IV. Conditions of Release

§ 44. Consent to search or drug testing as condition of release on bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42.5, 44(1)

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Validity, Construction, and Application of Statutes Establishing "24/7" Sobriety Programs, Requiring Persons Accused or Convicted of DUI or Similar Offenses to Submit to Regular Breath Testing as Condition of Pretrial Release, Parole, or Suspended Sentence, 28 A.L.R.7th Art. 8

Release on personal recognizance may, in some jurisdictions, properly be conditioned on the defendant's agreement to submit to drug testing[1] or warrantless search and seizure[2] during that period. Such a condition must be supported by probable cause and be justified by the totality of the circumstances, given the presumption of innocence.[3]

CUMULATIVE SUPPLEMENT

Cases:

A search as a condition of release falls within the narrow class of exceptions from the warrant requirement only when the legitimate governmental interests advanced by the search outweigh the level of intrusion inflicted upon the individual. Mass. Const. pt. 1, art. 14. Garcia v. Commonwealth, 486 Mass. 341, 158 N.E.3d 452 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Hernandez v. Roth, 890 So. 2d 1173 (Fla. 3d DCA 2004).

2 Rocco v. State, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

3 U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006) (evidence consisting of weapons found as a result of a warrantless search after the defendant was arrested for having tested, in accordance with a state bail condition, positive for drugs, suppressed in a federal weapons case); State v. Martin, 743 N.W.2d 261 (Minn. 2008) (ordering drug testing as standard practice, without considering the particular facts, violated a rule of criminal procedure); State v. Rose, 146 Wash. App. 439, 191 P.3d 83 (Div. 2 2008) (weekly drug testing may not be imposed without probable cause or a finding that the state had a special need to conduct the testing beyond the normal need for law enforcement, requiring a showing that drug use leads to a higher likelihood of absconding or an individual determination that the defendant's drug use would increase the likelihood of him failing to appear or committing some other violent crime).

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IV. Conditions of Release

§ 45. Conditions on bail imposed on federal defendants

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42.5

Mandatory conditions of pretrial release on personal recognizance, or on execution of an unsecured appearance bond,[1] are that the person not commit a federal, state, or local crime during the period of release, and that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized by statute.[2] These conditions are also required if the release is not on personal recognizance,[3] plus the least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community,[4] which may include the conditions that the person:

(1) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;[5]

(2) maintain employment, or, if unemployed, actively seek employment;[6]

(3) maintain or commence an educational program;[7]

(4) abide by specified restrictions on personal associations, place of abode, or travel;[8]

(5) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;[9]

(6) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;[10]

(7) comply with a specified curfew;[11]

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;[12]

(9) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in the applicable provision of the Controlled Substances Act,[13] without a prescription by a licensed medical practitioner;[14]

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;[15]

(11) execute an agreement to forfeit, on failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the person's appearance as required, and provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances, as the judicial officer may require;[16]

(12) execute a bail bond with solvent sureties;[17]

(13) return to custody for specified hours following release for employment, schooling, or other limited purposes;[18] and

(14) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.[19]

An indictee may be subject to pretrial release conditions that infringe upon his or her constitutional rights, provided that there has been an independent judicial determination that such conditions are necessary.[20]

In any case that involves a minor victim, in which kidnapping, certain sex offenses or failure to register as a sex offender are charged, a release order must contain, at a minimum, a condition of electronic monitoring and each of the conditions listed in items (4) through (8), above.[21]

Caution:

Although there is authority to the contrary,[22] procedures contained in the so-called "Adam Walsh Amendments" to the Bail Reform Act,[23] which prevent courts from evaluating and setting relevant conditions of pretrial release for persons charged with specified offenses who are ineligible for release on their own recognizance, by mandating that release be conditioned on curfew with electronic monitoring regardless of circumstances, have been held facially violative of procedural due process.[24]

There is also authority holding the amendments violative of due process as applied.[25]

A federal judicial officer may not impose a financial condition that results in the pretrial detention of the person.[26]

The judicial officer may, at any time, amend the order to impose additional or different conditions of release.[27] However, a person released before trial will continue on release during trial under the same terms and conditions as were previously imposed, unless

the court determines that other terms and conditions (or termination of release) are necessary to assure that person's presence during the trial, or to assure that the person's conduct will not obstruct the orderly and expeditious progress of the trial.[28]

CUMULATIVE SUPPLEMENT

Cases:

Under the Bail Reform Act, a wealthy defendant may be released from pretrial detention, with a condition of home confinement requiring defendant to pay for private armed security guards, only where, but for the defendant's wealth, he would not be detained. 18 U.S.C.A. § 3142. United States v. Boustani, 932 F.3d 79 (2d Cir. 2019).

Conditions of supervised release that were not announced orally by district court, requiring defendant to report to probation office within 72 hours of his release from prison, and requiring defendant to refrain from possessing a firearm, destructive device, or other dangerous weapon, were discretionary, and thus, those conditions, which were included in the later written sentence, conflicted with the oral sentence, and in that circumstance, the conditions were nullities. 18 U.S.C.A. § 3583(d); U.S.S.G. § 5D1.3(a). United States v. Anstice, 930 F.3d 907 (7th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 15.

2 18 U.S.C.A. § 3142(b).

3 18 U.S.C.A. § 3142(c)(1)(A).

4 18 U.S.C.A. § 3142(c)(1)(B).

5 18 U.S.C.A. § 3142(c)(1)(B)(i).

6 18 U.S.C.A. § 3142(c)(1)(B)(ii).

7 18 U.S.C.A. § 3142(c)(1)(B)(iii).

8 18 U.S.C.A. § 3142(c)(1)(B)(iv).
Since this is one of the conditions expressly specified in the statute, house arrest is a permissible condition, but it may not, itself, always provide the requisite assurance. U.S. v. Traitz, 807 F.2d 322 (3d Cir. 1986).

9 18 U.S.C.A. § 3142(c)(1)(B)(v).
Imposing a bail restriction barring defendants charged with conspiring to defraud their employer from interviewing potential government witnesses was not an abuse of discretion, despite the defendants' contention that the condition precluded them from effectively interviewing witnesses, where their attorney was able to contact witnesses, and there was no evidence that their attorney's preparation was inhibited by lack of specialized knowledge of their employer's operations. U.S. v. Vasilakos, 508 F.3d 401 (6th Cir. 2007).

10 18 U.S.C.A. § 3142(c)(1)(B)(vi).

11 18 U.S.C.A. § 3142(c)(1)(B)(vii).

12 18 U.S.C.A. § 3142(c)(1)(B)(viii).

13 21 U.S.C.A. § 802, discussed, generally, in Am. Jur. 2d, Drugs and Controlled Substances §§ 10, 12.

14 18 U.S.C.A. § 3142(c)(1)(B)(ix).

15 18 U.S.C.A. § 3142(c)(1)(B)(x).

16 18 U.S.C.A. § 3142(c)(1)(B)(xi).
The mere fact that the defendant has agreed that an item is forfeitable in a plea agreement does not make it so. The district court has a special responsibility to inquire whether assets are forfeitable, since a defendant

does not have an incentive to avoid agreeing to the forfeiture of assets that he or she has already transferred to a third party. U.S. v. De Ortiz, 910 F.2d 376 (7th Cir. 1990).

As to forfeiture of bail, generally, see §§ 127 to 140.

17 18 U.S.C.A. § 3142(c)(1)(B)(xii).

As to the sufficiency of sureties, generally, see § 76.

18 18 U.S.C.A. § 3142(c)(1)(B)(xiii).

19 18 U.S.C.A. § 3142(c)(1)(B)(xiv).

Under the provision for "any other condition that is reasonably necessary," a court had the authority to condition a defendant's release pending sentencing on freezing his assets. U.S. v. Welsand, 993 F.2d 1366 (8th Cir. 1993).

20 U.S. v. Laurent, 861 F. Supp. 2d 71 (E.D. N.Y. 2011).

21 18 U.S.C.A. § 3142(c)(1)(B) (concluding paragraph).

22 U.S. v. Stephens, 594 F.3d 1033, 54 A.L.R. Fed. 2d 685 (8th Cir. 2010); U.S. v. Peeples, 630 F.3d 1136 (9th Cir. 2010).

23 18 U.S.C.A. § 3142(c)(1)(B) (concluding paragraph).

24 U.S. v. Torres, 566 F. Supp. 2d 591 (W.D. Tex. 2008).

The Adam Walsh Act amendments to the Bail Reform Act, which mandated imposition of home detention and electronic monitoring as conditions of defendants' release on charges involving minor victims under the federal child pornography statute, without procedural safeguard of opportunity to be heard and to present evidence or exercise of judicial discretion of discrete facts, facially violated defendants' due process rights and gave rise to a risk of erroneous deprivation of protected interests in the right to travel and the presumption of innocence; the conditions imposed were based solely on charges against defendants and were not similarly mandated for other offenses, including those involving drugs, acts of violence, or even murder. U.S. v. Karper, 847 F. Supp. 2d 350 (N.D. N.Y. 2011).

25 U.S. v. Polouizzi, 697 F. Supp. 2d 381 (E.D. N.Y. 2010).

26 18 U.S.C.A. § 3142(c)(2).

As to the amount of bail, generally, see §§ 86 to 98.

As to release on one's own personal recognizance, generally, see § 15, and the effect of indigence, see § 30.

27 18 U.S.C.A. § 3142(c)(3).

28 Fed. R. Crim. P. 46(b).

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A. In General

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West's Key Number Digest

West's Key Number Digest, Bail 43, 49(1), 49(5)

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A.L.R. Index, Federal Bail Reform Act
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V. Bail or Detention Proceedings

A. In General

§ 46. General constitutional requirements applicable to bail or detention proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(1)

A bail hearing must provide a defendant with an opportunity to be heard at a meaningful time and in a meaningful manner.[1]

There is a Sixth Amendment interest in conducting bail hearings in open courtrooms, so that persons with relevant information can come forward.[2]

The pretrial detention provisions of the Bail Reform Act of 1984—by which arrestees may be detained without bail pending trial if, based on clear and convincing evidence after an adversary hearing, it is found that no release conditions will reasonably assure the safety of other persons and the community—do not violate due process, since the provisions are regulatory and not penal, the federal government's interest in preventing crime by those persons outweighs their liberty interest, the appropriateness of detention is guided by statutorily enumerated factors, and the arrested persons retain such rights as to counsel, testimony on their own behalf, and cross-examination of witnesses.[3]

Procedural violations of state bail law do not establish a violation of the Excessive Bail Clause of the Eighth Amendment.[4]

CUMULATIVE SUPPLEMENT

Cases:

Where the Commonwealth seeks pretrial detention hearing on account of a defendant's dangerousness, the defendant has a right to counsel, including, if appropriate, appointed counsel, and shall have the right to testify, to present witnesses and information, and to cross-examine witnesses who appear against him or her. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 276, § 58A. Commonwealth v. Vieira, 483 Mass. 417, 133 N.E.3d 296 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Segura v. Cunanan, 219 Ariz. 228, 196 P.3d 831 (Ct. App. Div. 1 2008).

2 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).
As to ex parte hearings, generally, see § 54.

3 U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

4 Galen v. County of Los Angeles, 477 F.3d 652 (9th Cir. 2007).

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V. Bail or Detention Proceedings

A. In General

§ 47. Right to bail hearing after arrest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(1), 49(5)

Because there is a presumption in favor of bail unless the proof is evident or the presumption great that a defendant committed a nonbailable offense,[1] a bail hearing must be provided,[2] as soon as is practicable to ensure that the accused is afforded due process, and to maintain the presumption of innocence.[3] It may be required that a hearing be held within a reasonable time after the arrest.[4] A statute that sets conditions of bail and pretrial release for individuals accused of domestic violence crimes does not violate due process, where there was not an unreasonable delay in holding the bail hearing.[5]

A party being held in custody pending a preliminary hearing may be entitled to a hearing on an application for admission to bail prior to the preliminary examination.[6] A defendant may be entitled to an expedited evidentiary hearing to determine whether reasonable conditions of pretrial release would protect the community and assure the accused's presence at trial.[7] Even a defendant who could not have been released from state custody as a result of a federal hold is still entitled to a bail hearing, if only for a determination of the bail amount.[8]

State law may specify what information the magistrate must give an arrested person when setting bail.[9]

At a federal defendant's initial appearance on a felony[10] or misdemeanor or other petty offense[11] charge, the court must inform the defendant of the general circumstances under which the defendant may secure pretrial release. A federal bail hearing must be held immediately on the person's first appearance before the judicial officer, unless that person, or the attorney for the government, seeks a continuance.[12] An “appearance,” for purposes of this provision, is one at which the custodial options available under the Bail Reform Act are at least considered, if not actually implemented.[13]

Observation:

It has been said that, although a prompt hearing is necessary under the Bail Reform Act of 1984, and the time limits of the Act must be followed with care and precision, the Act is silent on the issue of a remedy for a violation of those time limits, and a failure to comply with the first appearance requirement does not defeat the government's authority to seek detention of the person charged,[14] nor is it a sufficient justification to reverse the defendant's otherwise valid conviction.[15]

Practice Tip:

While a determination that the potential length of pretrial detention violates due process, because of the potential length of the possible pretrial delay, is impermissible and premature at the initial stage of criminal proceedings, the length of that delay may raise due process objections at some point, and a defendant who believes that the pretrial delay is unreasonable may seek reconsideration of the detention order.[16]

Footnotes

1 §§ 12, 29.

2 U.S. v. Savader, 944 F. Supp. 2d 209 (E.D. N.Y. 2013); U.S. v. Cannon, 711 F. Supp. 2d 602 (E.D. Va. 2010); Segura v. Cunanan, 219 Ariz. 228, 196 P.3d 831 (Ct. App. Div. 1 2008).

3 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

4 Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008) (but holding that denying bond for 73 days did not violate this rule, where a defendant who was indicted by a grand jury was not entitled to an initial appearance or preliminary hearing, and the defendant offered no proof that he was denied bond for an unreasonable amount of time).

5 State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (1999).

6 Ex parte Cheek, 1960 OK CR 69, 355 P.2d 881 (Okla. Crim. App. 1960).

7 Smith v. State, 933 So. 2d 689 (Fla. 5th DCA 2006).

8 Brandreth v. McRay, 930 So. 2d 846 (Fla. 3d DCA 2006).

9 Follansbee v. Plymouth Dist. Court, 151 N.H. 365, 856 A.2d 740 (2004) (including that a bail hearing may be held regardless of whether a fee is paid, and that the fee may be paid over time or will be waived for indigency).

10 Fed. R. Crim. P. 5(d)(1)(C).

11 Fed. R. Crim. P. 58(b)(2)(G).

12 18 U.S.C.A. § 3142(f).
Continuances are discussed in § 50.

13 U.S. v. Lee, 783 F.2d 92 (7th Cir. 1986).

14 U.S. v. Montalvo-Murillo, 495 U.S. 711, 110 S. Ct. 2072, 109 L. Ed. 2d 720 (1990) (holding that an accused was not entitled to release as a sanction for the delay, where the hearing did not occur until 13 days after the accused's arrest).

While a failure to provide a defendant with the hearing demanded by 18 U.S.C.A. § 3142 is unfortunate, it is not a sufficient reason to require the defendant's mandatory release. U.S. v. Meyers, 95 F.3d 1475 (10th Cir. 1996).

15 U.S. v. Meyers, 95 F.3d 1475 (10th Cir. 1996).

16 U.S. v. Portes, 786 F.2d 758 (7th Cir. 1985).

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V. Bail or Detention Proceedings

A. In General

§ 48. Application for bail pending appeal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(1)

An application for bail pending appeal is generally made by motion.[1] The trial court must act on such an application and state in writing the reasons for the action taken.[2]

The taking of an appeal is a jurisdictional prerequisite to the consideration of an application for bail pending appeal, and a judge to whom an application for bail pending appeal is made does not have the authority to consider such an application unless the defendant has established that an appeal was taken from the judgment or sentence.[3]

Footnotes

1 Y.Y. v. State, 205 Md. App. 724, 46 A.3d 1223 (2012).

2 U.S. v. Hart, 779 F.2d 575 (10th Cir. 1985).
Findings and determination on application for bail, generally, see § 56.

3 Morgenthau v. Rosenberger, 86 N.Y.2d 826, 633 N.Y.S.2d 473, 657 N.E.2d 494 (1995).

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A. In General

§ 49. Notice of bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(1)

A provision of state bail statutes requiring that a minimum of 72 hours' notice be given to a prosecuting attorney of a hearing by a judicial officer before a defendant eligible for release on personal recognizance could be so released has been found unconstitutional, as depriving an accused of the right to liberty without due process of law guaranteed by the United States and state constitutions, and as violating an indigent defendant's equal protection rights guaranteed by the Federal Constitution, where a defendant with financial means who was charged with a noncapital violent felony, and who could potentially pose a great threat to community safety, could obtain immediate release simply by posting bail.[1]

Under some state constitutions, the victim of a crime has the right to be informed of bail proceedings, unless, in the court's determination, the interests of justice require otherwise.[2]

Observation:

A trial court's failure to follow procedures required to deny defendant's request for pretrial release following violation of his or her monitored release is not cured by defendant being given notice and opportunity to be heard before being denied bond.[3]

Footnotes

1 State v. Blake, 642 So. 2d 959 (Ala. 1994).

2 In re Conard, 944 S.W.2d 191 (Mo. 1997).

3 Ginsberg v. Ryan, 60 So. 3d 475 (Fla. 3d DCA 2011).

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V. Bail or Detention Proceedings

A. In General

§ 50. Continuance on accused's motion for bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(1)

Under the Federal Bail Reform Act, except for good cause, a continuance on the accused's motion may not exceed five days—not including any intermediate Saturday, Sunday, or legal holiday—and a continuance on the prosecutor's motion may not exceed three days, again excluding any intermediate Saturday, Sunday, or legal holiday.[1]

Delaying a detention hearing for one accused person who has not moved for a continuance because others, similarly accused, have exercised their right to request a continuance, violates the nonmovant's right to a prompt detention hearing.[2]

State law may require a showing of probable cause on a request to continue a dangerousness hearing and the arrested person's detention pending the continuance, but this may be shown either through the issuance of a complaint, which itself must be based on probable cause, or by reading the police report to the judge; due process is satisfied by a hearing in which the defendant, represented by counsel, is afforded the opportunity to make representations and arguments, but not the right to present evidence or cross-examine witnesses.[3]

Footnotes

1 18 U.S.C.A. § 3142(f), also providing that during a continuance, the person must be detained, and the judicial officer, on motion of the attorney for the government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether the person is an addict.

2 U.S. v. Araneda, 899 F.2d 368 (5th Cir. 1990).

3 Com. v. Lester L., 445 Mass. 250, 835 N.E.2d 244 (2005).

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V. Bail or Detention Proceedings

A. In General

§ 51. Necessity and nature of bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

Where the granting of bail is a discretionary matter, a hearing and judicial determination is required before a defendant may be admitted to bail.[1] Every accused person is entitled to a hearing at which evidence relevant to his or her individual case is considered to determine the amount of bail.[2] Where bail is a matter of right, except in capital cases, if the proof is evident or the presumption great,[3] one accused of a capital offense is entitled to a hearing to determine those facts;[4] or, as sometimes stated, in the absence of a stipulation or other specific circumstances, a trial court must hold a hearing to make that determination before denying a request for bail.[5] However, a trial court may deny bail pending appeal without a hearing, if the motion, files, and record demonstrate that the defendant's request is without merit, and if the trial court makes sufficient findings to enable review of its decision.[6] Also, a defendant may waive a hearing on a determination to deny bail.[7]

Under some state constitutions, the victim of a crime has the right to be heard at bail proceedings, unless the court determines that the interests of justice require otherwise.[8]

It is permissible to conduct a bail hearing for a defendant found incompetent to stand trial.[9] It is preferred that a bail magistrate's decision to delay a bail hearing because the detainee cannot understand the conditions of release should be made after first-hand observation, but a magistrate's reliance on a credible police statement and breathalyzer results in delaying the hearing could not be said to be unreasonable or to constitute a violation of an accused's statutory right to be admitted to bail.[10]

Court rules do not impose any live witness limitations on the information considered at a pretrial detention hearing.[11] When a witness appears at a pretrial detention hearing, the trial court retains broad discretion to control the proceedings.[12]

Footnotes

1 People Ex. Rel Shapiro v. Keeper of the City Prison, 265 A.D. 474, 39 N.Y.S.2d 526 (1st Dep't 1943), order aff'd, 290 N.Y. 393, 49 N.E.2d 498 (1943).

2 Petition of Johnson, 72 S. Ct. 1028, 96 L. Ed. 1377 (1952); Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951); Ex parte Cheek, 1960 OK CR 69, 355 P.2d 881 (Okla. Crim. App. 1960).

3 § 29.

4 Application of Worley, 1960 OK CR 23, 350 P.2d 519 (Okla. Crim. App. 1960).

5 Yording v. Walker, 683 P.2d 788 (Colo. 1984).

6 People v. Gurule, 174 P.3d 846 (Colo. App. 2007).

7 Segura v. Cunanan, 219 Ariz. 228, 196 P.3d 831 (Ct. App. Div. 1 2008).
A defendant was given procedural due process in connection with the denial of bail, where, before the judge ruled on a motion to admit to bail, the defendant attacked the strength of the prosecution's case and asserted his own good character and ties to the community, and the judge offered to continue the case for an evidentiary hearing, but the defendant refused. Querubin v. Com., 440 Mass. 108, 795 N.E.2d 534 (2003).

8 In re Conard, 944 S.W.2d 191 (Mo. 1997).

9 Com. v. Torres, 441 Mass. 499, 806 N.E.2d 895 (2004) (noting that the inquiry at the bail hearing was of a limited and fact-specific nature, counsel would be able to ascertain and present information regarding the bail factors with little difficulty, and the defendant was able to understand the general nature of the proceedings and take counsel's advice).

10 Com. v. Finelli, 422 Mass. 860, 666 N.E.2d 144 (1996).

11 State ex rel. Torrez v. Whitaker, 2018-NMSC-005, 410 P.3d 201 (N.M. 2018).

12 State v. Pinkston, 233 N.J. 495, 187 A.3d 113 (2018).

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V. Bail or Detention Proceedings

A. In General

§ 52. Situations requiring federal detention hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 43, 49(1)

A federal judicial officer must hold a hearing to determine whether any condition or combination of conditions described in the applicable statutory provision[1] will reasonably assure the appearance of the person as required and the safety of any other person and the community[2] on the prosecutor's motion, in a case that involves:

- a crime of violence[3]
- sex trafficking of children or by force, fraud, or coercion[4]
- certain terrorism crimes[5]
- an offense for which the maximum sentence is life imprisonment or death[6]
- an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act[7]
- any felony if the person has been convicted of two or more of the offenses of the type described above, or two or more state or local offenses that would have been those types of offenses if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses[8]
- any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device or any other dangerous weapon, or involves a failure to register a firearm[9]

A hearing must also be held on the government's motion or on the judicial officer's own motion, in a case that involves (1) a serious risk that the person will flee,[10] or (2) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.[11]

The question whether an offense qualifies as "crime of violence," under the Bail Reform Act, thereby triggering a pretrial detention hearing,[12] must be resolved by a categorical approach referring to the elements of the offense, rather than on a case-by-case basis, and therefore the factual circumstances of the particular case are irrelevant.[13] The term "crime of violence" means an offense that has an element of use, attempted use, or threatened use of physical force against the person or property of another; any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or any felony under the criminal code provisions pertaining to peonage, slavery and trafficking of persons, sexual abuse, sexual exploitation or other abuse of children, and transportation for illegal sexual activity and related crimes.[14]

CUMULATIVE SUPPLEMENT

Cases:

Congress's use of the word involves in provision of the Bail Reform Act mandating that, in a case that involves crime of violence, court must hold a pretrial detention hearing on motion of government, did not permit court, in deciding whether the government had right to pretrial detention hearing, to look beyond the crime with which defendant was charged and assess whether that crime was related to any others that might be characterized as crimes of violence; rather, government was entitled to hearing only if a crime with which defendant was charged was itself a crime of violence, even though it might involve, or be in some way related, to some other violent crime. 18 U.S.C.A. § 3142(f)(1)(A). United States v. Watkins, 940 F.3d 152 (2d Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3142(c), as discussed, generally, in § 45.

2 18 U.S.C.A. § 3142(f).
Under 18 U.S.C.A. § 3142(f), a judicial officer may make a finding that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of any other person and the community only after holding a hearing. U.S. v. Cisneros, 328 F.3d 610 (10th Cir. 2003).

3 18 U.S.C.A. § 3142(f)(1)(A).

4 18 U.S.C.A. § 3142(f)(1)(A) (referring to a violation of 18 U.S.C.A. § 1591).

5 18 U.S.C.A. § 3142(f)(1)(A) (referring to terrorism crimes as defined by 18 U.S.C.A. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed).

6 18 U.S.C.A. § 3142(f)(1)(B).

7 18 U.S.C.A. § 3142(f)(1)(C) (referring to the provisions of 21 U.S.C.A. §§ 801 et seq., 21 U.S.C.A. §§ 951 et seq., and 46 U.S.C.A. §§ 70501 et seq., discussed, generally, in Am. Jur. 2d, Drugs and Controlled Substances §§ 1 et seq.).

8 18 U.S.C.A. § 3142(f)(1)(D).

9 18 U.S.C.A. § 3142(f)(1)(E) (incorporating the definition of a firearm in 18 U.S.C.A. § 921, and a failure to register under 18 U.S.C.A. § 2250).

10 18 U.S.C.A. § 3142(f)(2)(A).

11 18 U.S.C.A. § 3142(f)(2)(B).

12 18 U.S.C.A. § 3142(f)(1)(A).

13 U.S. v. Bowers, 432 F.3d 518 (3d Cir. 2005); U.S. v. Singleton, 182 F.3d 7 (D.C. Cir. 1999) (rejected on other grounds by, U.S. v. Stratton, 2001 WL 527442 (D. Ariz. 2001)).

14 18 U.S.C.A. § 3156(a)(4) (referring to felonies under 18 U.S.C.A. §§ 1581 to 1597; 18 U.S.C.A. §§ 2241 to 2248; 18 U.S.C.A. §§ 2251 to 2260a or 18 U.S.C.A. §§ 2421 to 2428).

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V. Bail or Detention Proceedings

A. In General

§ 53. Right to counsel at bail or detention hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

An accused is generally entitled to counsel at a bail or detention hearing.[1] At a federal detention hearing, the defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed.[2] However, a hearing to determine the defendant's entitlement to bail has not been determined to be a "critical stage" in the prosecution, so that the failure to provide counsel at such a hearing is not a ground for reversal, in the absence of a showing that prejudice has resulted.[3]

Footnotes

1 Simpson v. Miller, 241 Ariz. 341, 387 P.3d 1270 (2017), cert. denied, 138 S. Ct. 146, 199 L. Ed. 2d 37 (2017); Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004); Lavallee v. Justices In Hampden Superior Court, 442 Mass. 228, 812 N.E.2d 895 (2004) (in accordance with procedural due process and a preventive detention statute).

2 18 U.S.C.A. § 3142(f).

3 State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974).
For a discussion of the stages of criminal proceedings at which there is a right to assistance by counsel, generally, see Am. Jur. 2d, Criminal Law § 1094.

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A. In General

§ 54. Ex parte bail proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

A bail hearing should generally not be an ex parte proceeding, and the applicant should be allowed to examine the witnesses for the prosecution.[1] As a general rule, which may be subject to limited exceptions in particular jurisdictions,[2] ex parte in camera practice at a bail review hearing is inconsistent with a defendant's right to a hearing and an opportunity to refute the evidence.[3] Relying on in camera evidence is, as a general matter, inconsistent with the Bail Reform Act's procedural protections,[4] and doing so to deny a defendant's posttrial bail application violates due process, since the government's interest is limited to protecting its confidential witnesses' identities and safety, and where the government could have provided the defense with a redacted summary of the substance of its ex parte submission.[5]

While courts have, on rare occasions, sanctioned in camera presentations, this has been done only where there has been most compelling need and no alternative means of meeting that need; because the Bail Reform Act permits hearsay testimony,[6] the government will usually not need to present its case through in camera materials to protect potential witnesses.[7] When the government's opposition to bail is presented entirely ex parte, depending on the compelling need at issue, a court may consider whether defense counsel at least might be heard in the in camera proceeding concerning the necessity of proceeding ex parte, the scope of the proposed sealing order, and the availability of reasonable alternatives to sealing.[8] Where a defendant's detention on an ex parte submission spans several months, a court should require that the government periodically demonstrate the continued applicability of the factors used to exclude the public.[9]

Footnotes

1 State ex rel. Goepel v. Kelly, 68 So. 2d 351 (Fla. 1953).

2 Commonwealth v. Carman, 455 S.W.3d 916 (Ky. 2015).

3 U.S. v. Wind, 527 F.2d 672 (6th Cir. 1975).

As to whether an open hearing is required by the Sixth Amendment, see § 46.

4 U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986).

5 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).

6 § 58.

7 U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986).

8 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).

9 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).

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V. Bail or Detention Proceedings

A. In General

§ 55. Inquiry into source of property subject to forfeiture or collateral in connection with bail application

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(2)

In considering the conditions of release described in the Federal Bail Reform Act provisions pertaining to the execution of an agreement to forfeit certain property on failing to appear as required,[1] and to the execution of a bail bond with solvent sureties,[2] the judicial officer may sua sponte, or must, on the government's motion, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and must decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the accused's appearance as required.[3]

A state court may also have the authority to inquire into the source of bail funds.[4]

Footnotes

1 18 U.S.C.A. § 3142(c)(1)(B)(xi).

2 18 U.S.C.A. § 3142(c)(1)(B)(xii).
As to the conditions imposed on federal defendants, see § 45.

3 18 U.S.C.A. § 3142(g)(4).

4 Parrino v. Bradshaw, 972 So. 2d 960 (Fla. 4th DCA 2007).

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A. In General

§ 56. Findings and determination on application for bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

Detention determinations must be made individually and, in the final analysis, must be based on the evidence that is before the court concerning the particular defendant,[1] Bail may not be denied without the application of a reasonably clear legal standard and a statement of a rational basis for the denial.[2] A trial court must explain its reasons for denying bond in order to assist appellate review.[3] The court must make a determination on the record whether there is evident proof or a great presumption that the accused committed one of the charges for which bail may be denied, including the facts it finds and the analysis it employs.[4]

A Federal Rule of Appellate Procedure provides that a federal district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case,[5] and the Bail Reform Act also requires written findings of fact and a written statement of the reasons for the detention in a detention order.[6]

A state constitutional provision may require that a judge admitting a capital defendant to bail make specific findings in the release order explaining both the decision to grant bail and the amount of bond or other security required.[7] Under such a provision, bond cannot be denied at a first appearance, without the first appearance court making the necessary findings.[8] A remand is required where the trial court failed to make findings with respect to how the conditions imposed when granting a defendant bail satisfied the applicable statute and the trial court's stated concerns.[9]

CUMULATIVE SUPPLEMENT

Cases:

A judge's exercise of discretion when considering bail for a defendant charged with murder in the first degree should not rest solely on a presumption against bail, but should be based on a careful review of the specific details of the case and the defendant's history. Pinney v. Commonwealth, 484 Mass. 1003, 140 N.E.3d 379 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Tortora, 922 F.2d 880 (1st Cir. 1990).

2 Meechaicum v. Fountain, 696 F.2d 790 (10th Cir. 1983).
The trial court's decision to hold a murder defendant without bail was not arbitrary, and thus, did not constitute an abuse of discretion, where once the court determined that the evidence of guilt was great, it provided defendant with the opportunity to be heard on the issue of bail, and in its written decision, the court considered the evidence that either favored or disfavored defendant's release on bail, including evidence relating to the family members with whom defendant proposed to live, two of whom were found to be unsuitable. State v. Shores, 204 Vt. 630, 2017 VT 37, 168 A.3d 471 (2017).

3 McGlade v. State, 941 So. 2d 1185 (Fla. 2d DCA 2006); Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).
A trial court's statutory obligation to state its findings and reasons for pretrial detention in a written order is not a minor technicality, since written findings are a means of ensuring a thoughtful decision and facilitating expedited appellate review. Blackson v. U.S., 897 A.2d 187 (D.C. 2006).
As to appellate review of orders pertaining to bail, generally, see Am. Jur. 2d, Appellate Review §§ 209, 210.

4 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

5 Fed. R. App. P. 9(a)(1).

6 § 57.

7 State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).
As to the amount of bail, generally, see §§ 86 to 98.

8 Gray v. State, 257 So. 3d 477 (Fla. 4th DCA 2018).

9 State v. Hoffman, 183 Vt. 547, 2007 VT 141, 944 A.2d 912 (2007).

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V. Bail or Detention Proceedings

A. In General

§ 57. Order for release on bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

The Bail Reform Act requires that, in a release order, the judicial officer must include a written statement that states all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct;[1] and advise the person of the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release,[2] the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest,[3] and particular statutory sections relating to intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations, tampering with a witness, victim, or an informant, and retaliating against a witness, victim, or an informant.[4]

In a federal detention order, the judicial officer must include written findings of fact and a written statement of the reasons for the detention,[5] direct that the person be committed to the custody of the attorney general for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal,[6] direct that the person be afforded a reasonable opportunity for private consultation with counsel,[7] and direct that, on order of a court of the United States or on a prosecutor's request, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of appearing in connection with a court proceeding.[8]

It has been said that if the district court enters an order for pretrial release containing a financial condition that a defendant in good faith cannot fulfill, then, when the defendant makes known to the court that the stipulated condition of release is unattainable, the court must explain its reasons for determining that the particular requirement is an indispensable component of the conditions for release.[9]

Footnotes

1 18 U.S.C.A. § 3142(h)(1).
2 18 U.S.C.A. § 3142(h)(2)(A).
3 18 U.S.C.A. § 3142(h)(2)(B).
4 18 U.S.C.A. § 3142(h)(2)(C) (referring to provisions of 18 U.S.C.A. §§ 1503, 1510, 1512, 1513).
5 18 U.S.C.A. § 3142(i)(1).
6 18 U.S.C.A. § 3142(i)(2).
7 18 U.S.C.A. § 3142(i)(3).
8 18 U.S.C.A. § 3142(i)(4).
9 U.S. v. Mantecon-Zayas, 949 F.2d 548 (1st Cir. 1991).

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V. Bail or Detention Proceedings

B. Evidence

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 44(3.1), 49(3.1) to 49(5)

A.L.R. Library

A.L.R. Index, Bail and Recognizance
A.L.R. Index, Federal Bail Reform Act
West's A.L.R. Digest, Bail 44(3.1), 49(3.1) to 49(5)

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B. Evidence

§ 58. Admissibility of evidence at bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

The rules governing the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at a federal bail hearing.[1] The presentation of evidence at bail hearings may be more informal than at probable cause and suppression hearings,[2] and the Bail Reform Act permits hearsay testimony.[3]

While in some states, the evidence that may be adduced at a bail hearing is limited to that which is competent under the ordinary rules of evidence,[4] it has also been said that a pretrial bail proceeding in which the state makes the required probable showing that the accused committed a capital offense, precluding bail,[5] is not a mini-trial;[6] the state may make that showing using reliable[7] hearsay,[8] as in other pretrial proceedings to determine probable cause.[9] While ex parte affidavits are considered by some courts to be generally inadequate for the purpose of showing that the accused is entitled to bail,[10] other states have extended the admissibility of evidence in such a hearing to include affidavits and depositions.[11] A codefendant's confession may be considered if it is more probative on the point for which it is offered than any other evidence that the state can procure through diligent efforts under the circumstances, and the confession itself or circumstantial corroboration may render it sufficiently trustworthy.[12]

A court should admit only such evidence as is material to the question whether the proof is evident or presumption great that the accused committed one of the crimes qualifying for denial of bail, where that is the issue under a state bail provision.[13]

When faced with a challenge to the state's evidence in a bail hearing based on the constitutional exclusionary rule, a court engages in a two-step analysis, first inquiring whether the state has sufficient evidence to deny bail without considering the challenged evidence (and, if this is the case, the court need not proceed further), and then whether the state can establish a prima facie case of compliance with applicable constitutional requirements.[14]

Footnotes

1 18 U.S.C.A. § 3142(f).

2 U.S. v. Abuhamra, 389 F.3d 309 (2d Cir. 2004).

3 U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986).

4 Young v. Russell, 332 S.W.2d 629 (Ky. 1960) (testimony of a police officer concerning what the sole eyewitness to the offense told him rejected as hearsay).

Statements in an officer's affidavit to support an order holding defendant without bail, made by an alleged domestic violence victim, that she and defendant had gotten into an argument, after which he grabbed her by the hair and threw her against the wall, then grabbed her by the throat and slammed her against the wall again, were not excited utterances, and thus were inadmissible hearsay evidence, even though the victim was crying and fearful as she made the statements. State v. Crawford, 2018 VT 119, 2018 WL 5311407 (Vt. 2018).

5 § 29.

6 Harnish v. State, 531 A.2d 1264 (Me. 1987); State v. Hyppolite, 236 N.J. 154, 198 A.3d 952 (2018).

7 Harnish v. State, 531 A.2d 1264 (Me. 1987).

8 Harnish v. State, 531 A.2d 1264 (Me. 1987); State v. Hyppolite, 236 N.J. 154, 198 A.3d 952 (2018); Rico-Villalobos v. Giusto, 339 Or. 197, 118 P.3d 246 (2005).

The Commonwealth may rely on hearsay at a pretrial detention hearing for a person accused of certain offenses involving physical force or abuse. Garcia v. Commonwealth, 481 Mass. 1005, 111 N.E.3d 280 (2018).

A limitation on the use of hearsay evidence in a rule of criminal procedure providing that a final order of pretrial detention may not be based exclusively on hearsay evidence does not apply to pretrial release and motions to set bond. Castro v. State, 914 So. 2d 467 (Fla. 5th DCA 2005).

9 Harnish v. State, 531 A.2d 1264 (Me. 1987).

10 Ex parte Smith, 1958 OK CR 57, 326 P.2d 835 (Okla. Crim. App. 1958).

11 Gray v. State, 257 So. 3d 477 (Fla. 4th DCA 2018); Harnish v. State, 531 A.2d 1264 (Me. 1987) (affidavits); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 89 A.L.R.2d 345 (1960).

A defendant's alleged statements in an affidavit of probable cause constituted substantial, admissible evidence of guilt so as to support denial of bail, even though the defendant argued that he was not a native speaker of English and lacked an interpreter at the time he made the statements, where the defendant advised the officers that he understood English well enough to converse with them, and his statements were sufficiently detailed for a trial court to rely on them. State v. Avgoustov, 180 Vt. 595, 2006 VT 90, 907 A.2d 1185 (2006).

12 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985) (discussing the factors that bear on its trustworthiness).

13 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

14 State v. Avgoustov, 180 Vt. 595, 2006 VT 90, 907 A.2d 1185 (2006).

A trial court was required to exclude evidence, during a hearing to set the amount of bond, that a defendant charged with possession of a controlled substance had tested positive for marijuana use during drug testing imposed as a condition of pretrial release, since the testing was a warrantless search not supported by probable cause or a showing that state had a special need for the testing beyond the normal need for law enforcement. State v. Rose, 146 Wash. App. 439, 191 P.3d 83 (Div. 2 2008).

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V. Bail or Detention Proceedings

B. Evidence

§ 59. Presentation of testimony and cross-examination at bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

Generally, testimony at a bail hearing may be offered by one or both sides.[1] At a federal bail hearing, the accused must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.[2] Similarly, state courts recognize the right to examine and cross-examine witnesses and to review in advance those witnesses' prior written statements.[3] However, it has also been said that a defendant does not have a right per se to insist on the opportunity for cross-examination at a bail hearing, where neither the federal nor the applicable state constitution grant defendants a right to confront witnesses at a bail hearing.[4] Also, an accused, in a hearing under the federal statute, does not have a right to cross-examine adverse potential witnesses who have not been called to testify.[5] Furthermore, there is authority that in a detention hearing, counsel can rely on hearsay evidence that is not subject to cross-examination.[6]

Footnotes

1 State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 89 A.L.R.2d 345 (1960).

2 18 U.S.C.A. § 3142(f).

3 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

4 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).

5 U.S. v. Winsor, 785 F.2d 755 (9th Cir. 1986).

6 State v. Hyppolite, 236 N.J. 154, 198 A.3d 952 (2018).

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§ 60. Production of statements at bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

Provisions of a federal rule pertaining to disclosure by the defense of statements of defense witnesses on the government's motion[1] apply at a detention hearing, unless the court, for good cause shown, rules otherwise.[2] If a party disobeys an order to produce a witness's statement, the court may not consider that witness's testimony at the detention hearing.[3]

Footnotes

1 Fed. R. Crim. P. 26.2(a) to (d), (f).
For a discussion of Fed. R. Crim. P. 26.2, generally, see Am. Jur. 2d, Evidence §§ 1185, 1186.

2 Fed. R. Crim. P. 46(j)(1).

3 Fed. R. Crim. P. 46(j)(2).

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B. Evidence

§ 61. Presumptions and evidentiary burdens at bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(4)

Under some state statutes, the defendant has the burden of initially presenting evidence to show that he or she does not pose a significant risk of fleeing (by showing roots in the community), threatening the community, committing another crime, or intimidating a witness, and once the defendant meets the burden of production, the state must present evidence to rebut it.[1] However, to protect the presumption of innocence, the state has the burden of proof,[2] which is the ultimate burden of persuasion to convince the court that a defendant is not entitled to pretrial release, which means the state has the burden of proving, by a preponderance of the evidence,[3] that the trial court should deny bail either to secure the defendant's appearance in court or to protect the community.[4] Depending on the quality of the defendant's evidence, the state may not need to present any evidence to carry its burden of persuasion.[5] On the other hand, because a convicted defendant has lost the presumption of innocence,[6] the defendant may bear the burden of convincing the trial court to grant an appeal bond, and must present sufficient information, evidence, or argument to convince the trial judge that none of the factors precluding an appeal bond apply.[7]

There is generally a presumption in favor of bail, unless the proof is evident or the presumption great that a defendant committed a crime enumerated in a statute allowing bail to be denied,[8] and the burden of proving an exception to the presumption in favor of bail lies with the state.[9] There has sometimes been said to be a statutory presumption in pretrial bail proceedings that the likelihood of flight increases with the severity of the charges, the strength of the government's case and the potential penalty, and a similar presumption has also been said to be appropriate to bail proceedings during trial.[10]

When a charge against a federal defendant does not trigger a statutory presumption that no conditions of release can adequately assure the defendant's attendance at trial,[11] the prosecution has the burden of proving both that the defendant presents a risk of flight, and that no condition or combination of conditions can be imposed to reasonably assure the defendant's required attendance,[12] or that the defendant poses a danger to the community.[13] In establishing eligibility for release pending sentence or

appeal, the burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.[14] Under the Bail Reform Act provision generally requiring that a judicial officer order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained,[15] unless the judicial officer makes certain findings,[16] by clear and convincing evidence,[17] the burden of persuasion concerning the existence of a "substantial question" to be presented on the appeal rests on the defendant.[18] That is, the Bail Reform Act allows for the permissive release of a criminal defendant, but presumes detention.[19] However, even where the statutory presumption arises against pretrial release of a defendant, the government retains the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community, and by the lesser standard of a preponderance of the evidence that the defendant presents a risk of flight.[20] Under the Bail Reform Act, the government retains the burden of proving that no conditions will reasonably assure the defendant's appearance at trial.[21]

Observation:

Nothing in the federal statute pertaining to release or detention of a criminal defendant pending trial[22] may be construed as modifying or limiting the presumption of innocence.[23]

Footnotes

1 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993) (also stating that placing the burden of production on the defendant is fair because the accused is the best source of information on his or her community ties).

2 Segura v. Cunanan, 219 Ariz. 228, 196 P.3d 831 (Ct. App. Div. 1 2008).

3 § 64.

4 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

5 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

6 White v. State, 269 Ga. App. 113, 603 S.E.2d 686 (2004).

7 Luke v. State, 282 Ga. App. 749, 639 S.E.2d 645 (2006).

8 Segura v. Cunanan, 219 Ariz. 228, 196 P.3d 831 (Ct. App. Div. 1 2008).
Defendant's preparatory acts of purchasing a shotgun, with the intent to purchase at least one more gun, his plan to conduct surveillance of a high school to determine when the school resource officer would be absent, and social media messages that he planned to commit a shooting at the high school, did not fall within the definition of an attempt to commit a crime, and thus, the evidence of guilt was not "great" such that he could be presumed incarcerated rather than released prior to trial; each of defendant's actions was a preparatory act, and not an act undertaken in an attempt to commit a crime. State v. Sawyer, 2018 VT 43, 187 A.3d 377 (Vt. 2018).
As to the presumption in capital cases that bail be denied, see § 62.

9 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

10 U.S. v. Meinster, 481 F. Supp. 1117 (S.D. Fla. 1979).

11 § 63.

12 U.S. v. Sabhnani, 493 F.3d 63 (2d Cir. 2007); U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991); U.S. v. Cisneros, 328 F.3d 610 (10th Cir. 2003).

13 U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).
As to the standard of proof required, see § 64.

14 Fed. R. Crim. P. 46(c).

15 § 22.

16 § 40.

17 § 66.

18 U.S. v. Miller, 730 F. Supp. 1207 (N.D. N.Y. 1990).

19 United States v. Veloz-Alonso, 910 F.3d 266 (6th Cir. 2018).

20 U.S. v. English, 629 F.3d 311 (2d Cir. 2011).

21 U.S. v. Perez-Lugo, 979 F. Supp. 2d 197 (D.P.R. 2013).

22 18 U.S.C.A. § 3142.

23 18 U.S.C.A. § 3142(j).

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§ 62. Presumptions and evidentiary burdens at bail hearing —Capital and other offenses allowing denial of bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(4)

Where bail may be denied in capital cases or cases involving life imprisonment if the proof of guilt is evident or the presumption is great,[1] the burden of showing that the proof is evident or the presumption is great is usually on the state,[2] and it has been held that if the trial court intends to deny bail pursuant to a statute providing that a defendant is not entitled to bail as a matter of right if he or she is exposed to a maximum penalty of life imprisonment and the evidence of guilt is great, the state must show that facts exist which are legally sufficient to sustain a verdict of guilty, and the trial court must make a specific finding that this burden has been met.[3] However, there is also authority for the view that on an application for bail when a capital offense is charged, the petitioner is required to show facts sufficient to entitle him or her to bail, where those facts do not appear from the evidence offered on behalf of the prosecution[4]

When a case is governed by a statute under which a person charged with an offense punishable by life imprisonment can be held without bail, the ordinary presumption in favor of bail is switched so that the norm is incarceration and not release; with this, the defendant has the burden of proving that pretrial home detention is appropriate.[5] In cases where pretrial detention is presumed, factors relevant to the risk of flight, danger, or obstruction can still play a role in the defendant's rebuttal or the prosecution's response.[6]

In the federal courts, a grand jury indictment, by itself, establishes probable cause to believe that a defendant committed the crime with which he or she is charged,[7] and so, when the government presents an indictment including charges listed in the section of the Bail Reform Act creating a rebuttable presumption in favor of detention,[8] it has fulfilled its burden to establish the presumption in favor of detention.[9] Similarly, in state courts, the return of an indictment against the defendant for a capital offense has sometimes been regarded as furnishing a strong presumption of guilt,[10] and the defendant must produce sufficient

proof to overcome that presumption, or bail will be denied.[11] Thus, to be entitled to bail as of right, a defendant imprisoned for a capital offense by virtue of an indictment must overcome the presumption of guilt by proof, but if the defendant had not yet been indicted, there is no presumption of guilt, and the state has the burden of proving that the crime was committed and of showing facts that would convince the judge that, at trial, the judge would sustain a verdict pronouncing the defendant guilty and imposing the death penalty.[12]

On the other hand, despite the view sometimes followed that the return of an indictment against a defendant for a capital offense furnishes a strong presumption of guilt, statutory provisions prohibiting admission to bail in capital cases when the proof of guilt is evident or the presumption is great have sometimes specified that the finding of an indictment or the filing of an information does not add to the strength of the proof or the presumptions to be drawn from those documents.[13] It has also been said that a state's burden of showing probable cause that a defendant has committed a capital offense, so as to preclude bail, is no longer satisfied by the indictment alone, whatever may have been the earlier rule,[14] and in states following this view, the state has the burden to demonstrate that the proof is evident or the presumption great that the accused committed the offense at issue, even though an indictment has been returned.[15]

In some jurisdictions, in addition to having to demonstrate at a bail hearing that there is a likelihood of conviction, the state also has the burden to establish that there are reasonable grounds to believe that the death penalty may be imposed.[16]

Footnotes

1 § 29.

2 Stallings v. Ryan, 979 So. 2d 1167 (Fla. 3d DCA 2008); Fry v. State, 990 N.E.2d 429 (Ind. 2013); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 89 A.L.R.2d 345 (1960); Rico-Villalobos v. Giusto, 339 Or. 197, 118 P.3d 246 (2005).
A prosecutor's assertions about evidence that he feels he may be able to introduce are not "proof," for the purposes of the state's burden of proving that guilt is evident and the presumption strong, so as to come within the exception to the presumptive right to bail in a murder case; the magistrate must be shown information at the hearing from which he or she can make an independent determination whether there is admissible evidence against an accused that adds up to strong or evident proof of guilt. Fry v. State, 990 N.E.2d 429 (Ind. 2013).

3 State v. Breer, 198 Vt. 629, 2014 VT 132, 112 A.3d 1273 (2014).

4 Ex parte Smith, 1958 OK CR 57, 326 P.2d 835 (Okla. Crim. App. 1958).

5 State v. Shores, 2017 VT 102, 179 A.3d 196 (Vt. 2017).

6 State v. Robinson, 229 N.J. 44, 160 A.3d 1 (2017).

7 U.S. v. Stone, 608 F.3d 939 (6th Cir. 2010).

8 § 63.

9 U.S. v. Stone, 608 F.3d 939 (6th Cir. 2010).

10 Ex parte Womack, 62 Okla. Crim. 290, 71 P.2d 494 (1937).
The indictment furnishes a presumption of guilt, on which the state may rely. Quillen v. Betts, 48 Del. 93, 98 A.2d 770 (1953).

11 Fischer v. Ball, 212 Md. 517, 129 A.2d 822 (1957); Huff v. Edwards, 241 So. 2d 654 (Miss. 1970); Ex parte Womack, 62 Okla. Crim. 290, 71 P.2d 494 (1937).

12 Ex parte Patel, 879 So. 2d 532 (Ala. 2003).

13 State v. London, 131 Mont. 410, 310 P.2d 571 (1957).

14 Harnish v. State, 531 A.2d 1264 (Me. 1987).

15 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

16 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).

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§ 63. Presumptions and evidentiary burdens at bail hearing—Rebuttable presumptions for particular types of federal offenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(4)

In cases involving certain federal offenses, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judicial officer finds that the person has been convicted of such a federal offense, or of a state or local offense that would have been such an offense if a circumstance giving rise to federal jurisdiction had existed;[1] or any such offense was committed while the person was on release pending trial for a federal, state, or local offense;[2] and a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for that offense, whichever is later.[3] The cases in question are those involving:

- a crime of violence[4]
- sex trafficking of children or by force, fraud, or coercion[5]
- certain terrorism crimes[6]
- an offense for which the maximum sentence is life imprisonment or death[7]
- an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act[8]
- any felony if the person has been convicted of two or more of the offenses of the type described above, or two or more state or local offenses that would have been those types of offenses if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses[9]

• any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device or any other dangerous weapon, or involves a failure to register a firearm[10]

Furthermore, subject to rebuttal by the defendant, it will be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community, if the judicial officer finds that there is probable cause to believe that the person committed[11]—

— an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act,[12] the Controlled Substances Import and Export Act,[13] or the Maritime Drug Law Enforcement Act.[14]

— use of a firearm in connection with a crime of violence or drug trafficking crime.[15]

— conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country.[16]

— certain terrorism crimes.[17]

— an offense under the statutes criminalizing peonage, slavery, and trafficking in persons[18] for which a maximum term of imprisonment of 20 years or more is prescribed.

— certain offenses involving a minor victim.[19]

Observation:

The rebuttable flight presumption[20] reflects Congress's findings that drug traffickers often have resources and foreign contacts to escape to other countries, and that forfeiture of even a large bond may be just a cost of doing business. The provision only imposes the burden of production on the defendant, and the burden of persuasion remains with the government.[21]

A grand jury indictment is sufficient to establish a finding of probable cause that a defendant committed a federal drug offense with a maximum prison term of 10 years or more, so as to create a presumption that the defendant is a flight risk and a danger to the community, warranting pretrial detention.[22]

When a court finds probable cause that the defendant committed an offense warranting pretrial detention, so that a rebuttable presumption against release arises, the burden of production shifts to the defendant,[23] who must then come forward with evidence that he or she does not pose a danger to the community or a risk of flight.[24] To rebut the statutory presumption of dangerousness, defendants need not show that they are not guilty of the crimes charged in the first place, but can show that the specific nature of the crimes charged, or something about their individual circumstances, suggests that the general rule does not apply in the particular case.[25] Any evidence favorable to the defendant that comes within the list of factors in the federal statute on whether conditions of release will reasonably assure the person's appearance and the safety of any other person and the community[26] can affect the operation of the described presumptions, including evidence of the defendant's marital, family and employment status, ties to and his or her role in the community, and a clean criminal record.[27] Once the defendant

presents rebuttal evidence, the ultimate burden of persuasion remains with the government;[28] however, the presumption favoring detention does not entirely disappear, but remains a factor to be considered among those weighed by the court.[29]

CUMULATIVE SUPPLEMENT

Cases:

Defendant, who was charged with three counts of distribution, receipt, and possession of child pornography, adequately rebutted the presumption of detention, so as to shift burden of persuasion to government; defendant's lack of criminal history, community ties, steady employment, and family support, and Probation's supportive recommendation constituted some evidence sufficient to rebut the presumption. 18 U.S.C.A. § 3142(e)(3)(E). United States v. Cross, 389 F. Supp. 3d 140 (D. Mass. 2019).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3142(e)(2)(A).

2 18 U.S.C.A. § 3142(e)(2)(B).

3 18 U.S.C.A. § 3142(e)(2)(C).

4 18 U.S.C.A. § 3142(f)(1)(A).

5 18 U.S.C.A. § 3142(f)(1)(A) (referring to a violation of 18 U.S.C.A. § 1591).

6 18 U.S.C.A. § 3142(f)(1)(A) (referring to terrorism crimes as defined by 18 U.S.C.A. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed).

7 18 U.S.C.A. § 3142(f)(1)(B).

8 18 U.S.C.A. § 3142(f)(1)(C) (referring to the provisions of 21 U.S.C.A. §§ 801 et seq., 21 U.S.C.A. §§ 951 et seq., and 46 U.S.C.A. §§ 70501 et seq., discussed, generally, in Am. Jur. 2d, Drugs and Controlled Substances §§ 1 et seq.).

9 18 U.S.C.A. § 3142(f)(1)(D).

10 18 U.S.C.A. § 3142(f)(1)(E) (incorporating the definition of a firearm in 18 U.S.C.A. § 921, and a failure to register under 18 U.S.C.A. § 2250).

11 18 U.S.C.A. § 3142(e)(3).

12 21 U.S.C.A. §§ 801 et seq.

13 21 U.S.C.A. §§ 951 et seq.

14 46 U.S.C.A. §§ 70501 et seq.

15 18 U.S.C.A. § 924(c).

16 18 U.S.C.A. § 956(a).

17 18 U.S.C.A. § 2332b.
18 U.S.C.A. § 3142(e)(3)(B) makes the rule of 18 U.S.C.A. § 3142(e)(3) applicable to an offense under 18 U.S.C.A. § 2332b, while 18 U.S.C.A. § 3142(e)(3)(C) makes the rule of 18 U.S.C.A. § 3142(e)(3) applicable to an offense listed in 18 U.S.C.A. § 2332b(g)(5)(B), for which a maximum term of imprisonment of 10 years or more is prescribed

18 18 U.S.C.A. §§ 1581 to 1597.

19 18 U.S.C.A. §§ 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423 or 18 U.S.C.A. § 2425.

20 18 U.S.C.A. § 3142(e)(3).

21 U.S. v. Palmer-Contreras, 835 F.2d 15 (1st Cir. 1987).

22 United States v. Baker, 2018 WL 4915828 (D.N.M. 2018).

Probable cause existed to believe that defendant had committed a controlled substances offense for which a maximum term of imprisonment of 10 years or more was prescribed, and thus, it was rebuttably presumed that pretrial release should be denied, where the grand jury indicted defendant for such an offense; the police determined that based on the look and smell of liquid in vials recovered from defendant's home, they contained some amount of PCP; multiple packs of filtered cigarettes recovered from defendant's home were consistent with selling PCP by "fracking"; and defendant's very recent criminal history included a conviction for possession of liquid PCP. United States v. Little, 235 F. Supp. 3d 272 (D.D.C. 2017).

23 United States v. Baker, 2018 WL 4915828 (D.N.M. 2018).

24 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003); United States v. Lee, 206 F. Supp. 3d 103 (D.D.C. 2016); United States v. Salman, 241 F. Supp. 3d 1288 (M.D. Fla. 2017); United States v. Paulino, 335 F. Supp. 3d 600 (S.D. N.Y. 2018).

Defendant, charged with conspiracy to provide material support to a foreign terrorist organization, failed to rebut the presumption in favor of pretrial detention; not only did defendant attempt to travel overseas to join a violent terrorist organization, but he also participated in attempts to obtain forged travel documents. U.S. v. Musse, 107 F. Supp. 3d 1012 (D. Minn. 2015).

25 U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986).

26 § 35.

27 U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986).

A defendant indicted for interstate travel with intent to commit criminal sexual activity with a minor met his burden of production, on the government's motion for pretrial detention, of coming forward with evidence that he did not pose a danger to the community or risk of flight, by introducing a pretrial report, letters from members of his community, evidence that his family was willing to act as third-party custodians, and evidence that if he failed to appear for trial, his parents would forfeit an equity interest in their home. U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003).

A defendant indicted on child pornography charges failed to rebut the presumption that he presented a flight risk, warranting continued pretrial detention, even though he was employed, had no criminal record, and lived with his elderly mother, and more than half of his assets were nonliquid, where the defendant faced a significant period of incarceration if convicted, had previous interactions with the police concerning minor females, and did not have a spouse or children, and his liquid assets provided sufficient funds to flee. U.S. v. Gilkeson, 431 F. Supp. 2d 270 (N.D. N.Y. 2006).

28 U.S. v. Hir, 517 F.3d 1081 (9th Cir. 2008); United States v. Boykins, 316 F. Supp. 3d 434 (D.D.C. 2018); U.S. v. Valentin-Rosa, 740 F. Supp. 2d 289 (D.P.R. 2010).

29 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003); U.S. v. Hir, 517 F.3d 1081 (9th Cir. 2008); United States v. Taylor, 289 F. Supp. 3d 55 (D.D.C. 2018); United States v. Castanon-Perez, 2018 WL 1870431 (D.N.M. 2018); United States v. Paulino, 335 F. Supp. 3d 600 (S.D. N.Y. 2018).

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B. Evidence

§ 64. Sufficiency and standard of proof at hearing on pretrial release

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

The facts that a federal judicial officer uses to support a finding that no condition or combination of conditions will reasonably assure the safety of any other person and the community, so as to preclude pretrial release, must be supported by clear and convincing evidence.[1] Thus, on a motion for pretrial detention, while the government bears the burden of showing,[2] by a preponderance of the evidence, that the defendant poses a flight risk,[3] it must show by the higher standard of clear and convincing evidence that the defendant poses a danger to the community.[4] Thus, by requiring proof by clear and convincing evidence that a bail bond should be denied because no condition or set of conditions will reasonably assure the safety of society, the Bail Reform Act imposes a greater burden of proof on the government than the preponderance of the evidence standard applicable to the efficacy of conditions to assure attendance at trial.[5] The clear and convincing evidence standard is something more than a preponderance of the evidence, and something less than beyond a reasonable doubt.[6]

In some states, the prosecution must prove, by a preponderance of the evidence, that the trial court should deny pretrial bail either to secure the defendant's appearance in court or to protect the community.[7] It has elsewhere been said that the state's burden, to foreclose bail as a matter of right, is to present some further evidence which, viewed in the light most favorable to the state, would be legally sufficient to sustain a jury verdict of guilty.[8]

In the absence of a statutory presumption of a defendant's future dangerousness, a showing of a substantial probability that a defendant committed the charged offense, considered in conjunction with the nature and circumstances of the charged offense, may be enough to provide clear and convincing evidence of future dangerousness, as a basis for pretrial detention, but only if the offense truly indicates that the defendant threatens to engage in particular future criminal conduct.[9]

While hearsay is admissible at a detention hearing,[10] it does not meet the government's burden to show the defendant's dangerousness by clear and convincing evidence, if the government does not provide other details to give the hearsay indicia of reliability.[11] Also, in the absence of a statutory presumption of the defendant's future dangerousness,[12] the government's burden to prove future dangerousness by clear and convincing evidence cannot be satisfied simply by reference to the known facts regarding the crime of which the defendant has been accused.[13]

A trial court's failure, before ordering pretrial detention, to find by clear and convincing evidence that no conditions of release would reasonably assure public safety violates a detention statute, even if the detention order submitted by the government after the detention hearing did recite that finding, where, when the trial court signed that order, the defendant had been detained in violation of the statute's requirements for two months.[14]

Footnotes

1 18 U.S.C.A. § 3142(f).

2 § 61.

3 U.S. v. Araneda, 899 F.2d 368 (5th Cir. 1990); U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003); U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).
The government proved by a preponderance of the evidence that a defendant, if released on bail prior to a drug possession and distribution trial, posed a serious risk of flight or failure to appear, where it showed that the defendant faced a lengthy term of incarceration if convicted, he was a highly educated individual who had traveled frequently in the past, he could flee to another country with his partner from there, he could have access to large amounts of money, which would provide the means to flee, and he had a history of irresponsible behavior. U.S. v. Arndt, 329 F. Supp. 2d 182 (D. Mass. 2004).
The government failed to show by a preponderance of the evidence that a defendant posed a flight risk, as required for the defendant's detention pending trial for bank fraud, where, even though at the time of arrest, the defendant possessed on his person two United States passports and two driver's licenses, all in his name, and he was involved in an extramarital affair outside the country, the vast majority of his family, economic and social ties were in Puerto Rico, he had traveled abroad numerous times on business or religious matters and always returned, and he was not likely facing a long prison sentence if convicted. U.S. v. Cruz, 363 F. Supp. 2d 40 (D.P.R. 2005).

4 U.S. v. Abad, 350 F.3d 793, 62 Fed. R. Evid. Serv. 1533 (8th Cir. 2003); U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).
The government proved by clear and convincing evidence that a defendant would be a danger to another person or the community if released on bail prior to a drug possession and distribution trial, where it showed that the defendant's planning of the charged crimes was typical of an experienced drug dealer and not a casual drug user, he had applied his considerable intellectual acumen to conducting criminal activity, the circumstances of the present charges occurred when the defendant was already on bail facing very serious charges under a specific condition of release that he not commit another crime, and he failed to seek drug treatment, although he had an ample opportunity to do so. U.S. v. Arndt, 329 F. Supp. 2d 182 (D. Mass. 2004).

5 United States v. Fattah, 2019 WL 210955 (N.D. Ill. 2019).

6 United States v. Paulino, 335 F. Supp. 3d 600 (S.D. N.Y. 2018).

7 Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

8 Gallo v. Lamberti, 972 So. 2d 305 (Fla. 4th DCA 2008).

9 Blackson v. U.S., 897 A.2d 187 (D.C. 2006).

10 § 58.

11 U.S. v. Cruz, 363 F. Supp. 2d 40 (D.P.R. 2005).

12 § 63.

13 Blackson v. U.S., 897 A.2d 187 (D.C. 2006).

14 Blackson v. U.S., 897 A.2d 187 (D.C. 2006).

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B. Evidence

§ 65. Sufficiency and standard of proof at hearing on pretrial release—Capital and other nonbailable offenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(3.1)

Provisions except from the right to bail capital offenses or offenses subject to life imprisonment, or other specified offenses, where the proof is evident or the presumption great, or under various similar standards.[1] Under such a provision, one accused of a capital crime is entitled to bail, unless it clearly appears that the capital offense charged was committed by the accused.[2] The terms "proof is evident" and "presumption great" denote that the evidence produced at a bail hearing must be cogent and persuasive.[3] The word "evident" is construed to mean manifest, plain, clear, obvious, apparent, and notorious, and unless it so appears that the accused is guilty of a capital crime, bail should be allowed.[4]

Constitutional provisions excluding bail for persons charged with capital offenses when the proof is evident or presumption great have sometimes been further implemented by rules of criminal procedure excepting from bail persons charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed, and the quantum of evidence necessary to satisfy this standard has been described as a "fair likelihood" of conviction.[5]

According to some authority, under a statute providing that a person charged with certain offenses may be held without bail when the evidence of guilt is great, in order to show that evidence of guilt is great, the state has the burden of showing that substantial, admissible evidence of guilt exists, and that the evidence can fairly and reasonably convince a fact-finder beyond a reasonable doubt that defendant is guilty.[6] Some authority even requires that the evidence be greater than that required to establish guilt beyond a reasonable doubt.[7] On the other hand, it has also been held that for denial of bail, the proof that defendant committed a qualifying offense is required to be substantial, but not necessarily proof beyond a reasonable doubt.[8]

In some jurisdictions, the state's showing of probable cause that a defendant has committed a capital offense defeats the constitutional right to bail, and probable cause for this purpose has been defined as facts and circumstances sufficient to warrant a prudent person believing that the accused committed the offense.[9] It has also been held that the issue is whether there is evidence from which the trial court can make an independent determination that evidence that likely will be admissible at trial shows that proof of the defendant's guilt is evident or the presumption strong, not whether the defendant had the same opportunity to test that evidence that the defendant will have at trial.[10]

The testimony of eyewitnesses is to be given great weight, and where their testimony indicates strongly that a capital crime has been committed, the court is justified in refusing bail.[11] On the other hand, the standard is not met if the state's evidence is arguably impeached in substantial respects by other evidence or is replete with substantial contradictions and discrepancies.[12]

Footnotes

1 § 29.

2 Huff v. Edwards, 241 So. 2d 654 (Miss. 1970); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 89 A.L.R.2d 345 (1960); Ex parte Salazar, 151 Tex. Crim. 154, 205 S.W.2d 987 (1947).

3 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).
The phrase "proof is evident or presumption great" requires that the state show that all of the evidence, fully considered by the court, makes it plain and clear to the court's understanding, and satisfactory and apparent to the court's well-guarded, dispassionate judgment, that the accused committed one of the offenses enumerated in the statute. Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

4 Huff v. Edwards, 241 So. 2d 654 (Miss. 1970); Ex parte Gragg, 149 Tex. Crim. 10, 191 S.W.2d 32 (1945).

5 State v. Engel, 99 N.J. 453, 493 A.2d 1217 (1985).

6 State v. Theriault, 198 Vt. 625, 2014 VT 119, 109 A.3d 448 (2014).

7 Preston v. Gee, 133 So. 3d 1218 (Fla. 2d DCA 2014).

8 Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (Ct. App. Div. 1 2004).

9 Harnish v. State, 531 A.2d 1264 (Me. 1987).

10 Rico-Villalobos v. Giusto, 339 Or. 197, 118 P.3d 246 (2005).

11 Holland v. Asher, 314 S.W.2d 947 (Ky. 1958).

12 Stallings v. Ryan, 979 So. 2d 1167 (Fla. 3d DCA 2008).

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B. Evidence

§ 66. Sufficiency and standard of proof at hearing on bail pending appeal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 44(3.1), 49(3.1)

The Bail Reform Act provision generally requires that a judicial officer order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained,[1] unless the judicial officer finds, by clear and convincing evidence,[2] that the person is not likely to flee or pose a danger to the safety of any other person or the community if released.[3] To grant bail pending appeal, a court must find that (1) the defendant has met the burden of proving by clear and convincing evidence that he or she is not likely to flee or pose a danger to the safety of the community if released,[4] and (2) the defendant has established by a preponderance of the evidence that the appeal is not for purpose of delay, the appeal raises a substantial question of law or fact, and if that substantial question is determined favorably to defendant on appeal, the decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.[5] Other authority states that to be released pending appeal, a defendant must show by clear and convincing evidence that (1) he or she is not likely to flee, (2) he or she is not likely to pose a danger to the safety of any other person or the community, (3) the appeal is not for the purpose of delay, and (4) the appeal raises a substantial question of law or fact likely to result in either a sentence that does not include a term of imprisonment or a reduced sentence to a term of imprisonment less than the expected duration of the appeal process.[6]

Some state statutes require clear and convincing evidence to order the defendant's recommitment pending appeal.[7]

Observation:

In addition to any evidence offered by the defendant in support of a request for an appeal bond, the trial judge may consider all the evidence adduced at the trial that is pertinent to the appeal bond determination.[8]

Footnotes

1 § 22.

2 18 U.S.C.A. § 3143(a)(1).

3 § 40.

4 U.S. v. Meyers, 95 F.3d 1475 (10th Cir. 1996).
Release pending appeal is not warranted where the defendant does not establish that he will not flee or that he does not pose a danger to the community, and the government clearly demonstrates that the defendant does pose a danger to the community. U.S. v. Quintana, 525 F. Supp. 917 (D. Colo. 1981).

5 U.S. v. Meyers, 95 F.3d 1475 (10th Cir. 1996).

6 U.S. v. Farlow, 824 F. Supp. 2d 189 (D. Me. 2011).

7 State v. Stradt, 556 N.W.2d 149 (Iowa 1996).

8 Malloy v. State, 329 Ga. App. 38, 763 S.E.2d 501 (2014).

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B. Evidence

§ 67. Reopening of bail hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 49(5)

A federal detention hearing may be reopened before or after a determination by the judicial officer, at any time before trial, if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.[1] However, a federal bail hearing should not be reopened on the basis of information that was available to the defendant at the time of the hearing.[2]

When exculpatory evidence is disclosed after a detention hearing, judges should use a modified materiality standard to decide whether to reopen the hearing; if there is a reasonable possibility that the result of the detention hearing would have been different had the evidence been disclosed, the hearing should be reopened.[3]

A witness's attempted recantation of bail hearing testimony, which did not indicate which previous answers were false or specify in what respect they were false, failed to clear the threshold hurdle for admitting it as a genuine recantation.[4]

Footnotes

1 18 U.S.C.A. § 3142(f).
Defendant, charged with participating in a conspiracy involving a pattern of racketeering activity, including murder, robbery, attempted robbery, and drug distribution, failed to present new material information sufficient to warrant reopening a detention hearing, even though he argued that discovery had failed to produce any corroboration of his role in the conspiracy, where the government was likely to rely on confidential witnesses; at the detention hearing, the government had stated that it had evidence that defendant

had been involved with a drive-by shooting as well as other shootings in which he had fired a gun. United States v. Banks, 334 F. Supp. 3d 589 (S.D. N.Y. 2018).

2 United States v. Esposito, 2019 WL 306121 (S.D. N.Y. 2019).
Defendant's circumstances did not meet the statutory threshold for a de novo detention hearing after the magistrate judge granted the government's motion for detention without bail pending trial, and thus, the district court would not exercise its discretion to conduct a supplementary evidentiary hearing as part of its de novo review of the detention order, where although defendant alleged that there was exculpatory information contained in evidence collected from the discovery process and his own investigation, what he characterized as exculpatory evidence was his own analysis of the evidence, rather than previously unavailable, material evidence. U.S. v. Rodriguez-Adorno, 606 F. Supp. 2d 232 (D.P.R. 2009).

3 State v. Hyppolite, 2018 WL 6493875 (N.J. 2018).

4 State v. Garcia, 743 A.2d 1038 (R.I. 2000).

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Research References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44(3.1), 73.1

A.L.R. Library

A.L.R. Index, Bail and Recognizance
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§ 68. Review of conditions of release on bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73.1

Forms

Forms relating to conditions of release, see Am. Jur. Pleading and Practice Forms, Criminal Procedure; Am. Jur. Pleading and Practice Forms, Federal Criminal Procedure; Federal Procedural Forms, Criminal Procedure [Westlaw®(r) Search Query]

Under the Federal Bail Reform Act, if a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense or a federal appellate court, the prosecutor may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or for amendment of the conditions of release,[1] and the person may file, with the court having original jurisdiction over the offense, a motion for amendment of those conditions.[2] These motions must be determined promptly.[3]

State statutes may also provide that a court may, at any time after notice and a hearing, amend a bail order to impose additional or different conditions of release.[4]

Footnotes

1 18 U.S.C.A. § 3145(a)(1).

As to conditions of release, generally, see §§ 42 to 45.

2 18 U.S.C.A. § 3145(a)(2).

3 18 U.S.C.A. § 3145(a).

4 State v. McIntyre, 307 S.C. 363, 415 S.E.2d 399 (1992).

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C. Changes to Order

§ 69. Review of detention order

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73.1

A person held by federal authorities ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense or a federal appellate court, may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order, which must be determined promptly.[1]

When a defendant seeks a review of a magistrate judge's detention order, the district court should fully review the denial of bail, and reach an independent conclusion.[2] In other words, the standard of review for a district court's review of a magistrate judge's detention or release order is de novo.[3]

CUMULATIVE SUPPLEMENT

Cases:

When a pretrial detainee seeks renewed evaluation of prior pretrial detention order, by alleging health concerns arising from COVID-19 pandemic, the court should evaluate the particularized risks posed to detainee, by considering: (1) original grounds for pretrial detention; (2) specificity of detainee's stated COVID-19 concerns; (3) extent to which detainee's proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to detainee; and (4) likelihood that detainee's proposed release would increase COVID-19 risks to others. 18 U.S.C.A. § 3142(f)(2)(B). United States v. Rowe-Hodges, 454 F. Supp. 3d 618 (E.D. Tex. 2020).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 3145(b).

2 U.S. v. Carter, 916 F. Supp. 193 (N.D. N.Y. 1996).

3 U.S. v. Hitselberger, 909 F. Supp. 2d 4 (D.D.C. 2012); U.S. v. Gennaco, 834 F. Supp. 2d 38 (D. Mass. 2011); United States v. Baker, 2018 WL 4915828 (D.N.M. 2018); U.S. v. Parker, 65 F. Supp. 3d 358 (W.D. N.Y. 2014); U.S. v. Boyd, 29 F. Supp. 3d 658 (E.D. N.C. 2014); United States v. Mallory, 268 F. Supp. 3d 854 (E.D. Va. 2017).

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C. Changes to Order

§ 70. District court having authority to review release or detention order

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73.1

The plain language of the statute governing review of release and detention orders[1] dictates that the district court in prosecuting district with original jurisdiction over the offense is the only proper court to review a release order issued by a magistrate judge; therefore, if the magistrate judge is in another district, this precludes review of the magistrate judge's order by a district judge in the magistrate's district.[2] The government or an arrestee who moves for review of a release or detention order must do so in the district court where the charges are pending, regardless of where the initial appearance and detention hearing took place.[3] Also, a magistrate judge in the charging district may not review an order denying detention issued by another magistrate judge in the arresting district.[4] Applying these principles, a district court in the district where the indictment is pending has the authority to review an order of another district court, sitting where the defendant was arrested, which granted the defendant pretrial release, and to revoke that order on proper findings, even though a magistrate in the district of the indictment does not have the authority to rule on the government's motion to revoke the release order, so long as the district judge reviews the detention order de novo and considers all the evidence that had been offered.[5]

If a person is arrested for failing to appear in another district or for violating conditions of release set in another district, the judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.[6]

Footnotes

1 18 U.S.C.A. § 3145(a), (b).

2 U.S. v. Torres, 86 F.3d 1029 (11th Cir. 1996).

3 U.S. v. Vega, 438 F.3d 801 (7th Cir. 2006); U.S. v. Evans, 62 F.3d 1233 (9th Cir. 1995).

4 U.S. v. Johnson, 858 F. Supp. 119 (N.D. Ind. 1994).

5 U.S. v. Cisneros, 328 F.3d 610 (10th Cir. 2003).

Review of an order of a magistrate judge sitting in the Southern District of New York, where immigration charges against the defendant were pending, conditionally releasing the defendant to attend court proceedings in the Eastern District of North Carolina, where mail fraud charges against the defendant were pending, was properly sought in the Eastern District of North Carolina, and the judge sitting in New York properly refused to undertake review after the judge sitting in North Carolina issued an order revoking the New York magistrate judge's release order. U.S. v. El Edwy, 272 F.3d 149 (2d Cir. 2001).

6 Fed. R. Crim. P. 40(c).

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C. Changes to Order

§ 71. Appeal of release or detention order; release under exceptional circumstances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 42, 44(3.1), 73.1

An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the jurisdictional statute pertaining to final decisions of the federal district courts,[1] and the statute governing appeals by the United States,[2] and the appeal must be determined promptly.[3] A court of appeals lacks jurisdiction to review a magistrate judge's order of detention pending judicial proceedings, where the order had not been reviewed by the district court.[4]

On such an appeal, a person subject to detention pursuant to the provision on detention or release before sentencing[5] or pending appeal[6] and who meets the conditions of release described in the applicable statute,[7] may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why that person's detention would not be appropriate.[8] In this context, courts typically understand the phrase "exceptional reasons" to refer to circumstances that are clearly out of the ordinary, uncommon, or rare.[9] That is, an exceptional circumstance requires something out of the ordinary to distinguish the defendant's case from those of other defendants subject to mandatory detention.[10] This exceptional circumstances test is a flexible one, and courts have wide latitude to determine whether a particular set of circumstances qualifies as exceptional,[11] so long as there is a unique combination of circumstances giving rise to situations that are out of the ordinary.[12] Factors which may be considered in finding exceptional reasons include the aberrational nature of the conduct; the nature of the act; the length of the imposed and maximum sentences; circumstances that would render prison unusually harsh for the particular defendant, such as serious illness or injury; the nature of the defendant's arguments on appeal; the unlikelihood that the defendant will flee or constitute a danger to the community; and an unusual degree of cooperation with the government,[13] and for this purpose, a legal issue may be of such weight that it forms the basis of an “exceptional reason” against detention.[14] In addition, time-sensitive surgeries and serious disruptions of family life may constitute exceptional reasons, if it is clearly

shown that there are exceptional reasons why such person's detention would not be appropriate.[15] However, a variety of facts and circumstances have not been found to constitute exceptional reasons.[16]

Because the statute requires that the defendant otherwise meet the criteria for release, a judge must find that a defendant does not pose a risk of flight or a danger to the community, and raises a substantial question of law or fact, not presented simply to delay incarceration, for determination on appeal before considering whether "exceptional reasons" exist making detention inappropriate.[17]

Observation:

The statutory provision in question[18] applies only to appellate jurisdiction, and thus a district court lacks jurisdiction to order the release of a convicted defendant based on exceptional reasons.[19] The statute authorizes release pending the disposition of the merits of the appeal, not just pending the appeal.[20]

CUMULATIVE SUPPLEMENT

Cases:

A defendant should not be entitled to temporary release from pretrial detention, under the statutory subsection permitting such release for a compelling reason, based solely on generalized COVID-19 fears and speculation; instead, the court must make an individualized determination as to whether COVID-19 concerns present such a compelling reason in a particular case that temporary release is necessary. 18 U.S.C.A. § 3142(i). United States v. McDonald, 451 F. Supp. 3d 1174 (D. Nev. 2020).

[END OF SUPPLEMENT]

Footnotes

1 28 U.S.C.A. § 1291, discussed in Am. Jur. 2d, Appellate Review § 79.
2 18 U.S.C.A. § 3731, discussed in Am. Jur. 2d, Appellate Review § 216.
3 18 U.S.C.A. § 3145(c).
4 U.S. v. Harrison, 396 F.3d 1280 (2d Cir. 2005).
5 § 21.
6 § 22.
7 18 U.S.C.A. § 3143(a)(1), discussed in § 39, or 18 U.S.C.A. § 3143(b)(1), discussed in § 40.
8 18 U.S.C.A. § 3145(c).
9 United States v. Lovo, 263 F. Supp. 3d 47 (D.D.C. 2017).
10 U.S. v. Smith, 34 F. Supp. 3d 541 (W.D. Pa. 2014).

The effect of detention on defendant's relationship with her mother was not an exceptional circumstance that warranted her release pending sentencing for drug trafficking; even though defendant's reconciliation with her mother was admirable; to be exceptional for family reasons, defendant's detention must have imposed an unusually harsh effect of a personal nature not ordinarily experienced by an individual facing incarceration. United States v. Lopez, 184 F. Supp. 3d 1139 (D.N.M. 2016).

Defendant's desire to secure basic housing for his mother and to manage her financial affairs, to provide financial, physical, and spiritual help to her, and to arrange his own personal affairs did not constitute "exceptional reasons" why his mandatory detention would be inappropriate pending sentencing on his guilty plea to an offense for which he faced 10 or more years of imprisonment, even though the government did not oppose relief from mandatory detention and defendant complied with all the terms of his pretrial release while on bond, where defendant's reasons involved purely personal matters that individually and in combination were no more out of ordinary and no more unique than those of other persons subject to detention. U.S. v. Posada, 109 F. Supp. 3d 911 (W.D. Tex. 2015).

11 U.S. v. Lea, 360 F.3d 401 (2d Cir. 2004); U.S. v. Smith, 34 F. Supp. 3d 541 (W.D. Pa. 2014).

12 U.S. v. Lea, 360 F.3d 401 (2d Cir. 2004).

13 U.S. v. Garcia, 340 F.3d 1013 (9th Cir. 2003).

14 U.S. v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992).

15 U.S. v. Williams, 903 F. Supp. 2d 292 (M.D. Pa. 2012).

16 U.S. v. Lea, 360 F.3d 401 (2d Cir. 2004) (status as a student or as a first time offender); U.S. v. Krantz, 530 Fed. Appx. 609 (8th Cir. 2013) (defendant's three tours of duty with the military in Iraq and Afghanistan and his position as a night nurse); U.S. v. Nickell, 512 Fed. Appx. 660 (8th Cir. 2013) (defendant's success in having remained free of methamphetamine use, his full-time employment, and his care of three young children); U.S. v. Little, 485 F.3d 1210 (8th Cir. 2007) (the defendant cooperated in the investigation and appeared on time for all proceedings); U.S. v. Garcia, 340 F.3d 1013 (9th Cir. 2003) (defendants were correction officers); U.S. v. Smith, 34 F. Supp. 3d 541 (W.D. Pa. 2014) (gainful employment up until the date of sentencing).

17 U.S. v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992).

18 18 U.S.C.A. § 3145(c).

19 U.S. v. Harrison, 430 F. Supp. 2d 1378 (M.D. Ga. 2006); U.S. v. Chen, 257 F. Supp. 2d 656 (S.D. N.Y. 2003).

20 U.S. v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992).

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VI. Nature of Bond or Recognizance; Sureties

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 54.1, 55, 57 to 60, 62, 69

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West's A.L.R. Digest, Bail 54.1, 55, 57 to 60, 62, 69

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VI. Nature of Bond or Recognizance; Sureties

A. In General

§ 72. Nature of bond or recognizance, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 54.1

Bail is evidenced by a bond or recognizance, which ordinarily becomes a record of the court.[1] A bail bond is often referred to as a contract between the surety and the government,[2] on a criminal defendant's behalf,[3] whereby the state agrees to release the defendant into the surety's custody and the surety agrees to ensure the defendant is present in court on the appearance date.[4] However, some authority refers to a bail bond as a contract of the defendant and the surety with the state,[5] or a contract between the state on one side and an accused and his or her surety on the other side.[6] It has also been said that a criminal surety bail bond is, in essence, a contract involving three parties: the state, which brings the criminal charges; the bail bond agent, which is the surety; and the defendant, who is the principal.[7]

The purpose of a bail bond is to assure that the defendant will comply with its condition to appear or be produced by the surety.[8] Generally, the surety acts as a guarantor of the defendant's appearance under risk of forfeiture of the bond; the surety guarantees that the defendant will appear at the specific time and place, and if the defendant fails to do so, the surety is absolutely indebted to the state for the amount of the bond.[9]

Footnotes

1 In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

2 U.S. v. Torres, 807 F.3d 257 (7th Cir. 2015); All Star Bail Bonds, Inc. v. Eighth Jud. Dist. Ct., 130 Nev. 419, 326 P.3d 1107, 130 Nev. Adv. Op. No. 45 (2014); State v. Dye, 2018-Ohio-4551, 2018 WL 5920501 (Ohio Ct. App. 5th Dist. Fairfield County 2018); State v. Mottolese, 199 Vt. 470, 2015 VT 81, 124 A.3d 809 (2015).

3 U.S. v. Torres, 807 F.3d 257 (7th Cir. 2015).

4 State v. Dye, 2018-Ohio-4551, 2018 WL 5920501 (Ohio Ct. App. 5th Dist. Fairfield County 2018).

5 State v. Cortez, 229 N.C. App. 247, 747 S.E.2d 346 (2013).

6 American Funding Services v. State, 41 A.3d 711 (Del. 2012); State v. Big Dawg Bail Bonds, 157 Idaho 373, 336 P.3d 306 (Ct. App. 2014).

7 Polakoff & Aabbott Bail Bonds v. State, 111 So. 3d 253 (Fla. 5th DCA 2013).

8 Universal Bail Bonds, Inc. v. State, 929 So. 2d 697 (Fla. 3d DCA 2006).

9 State v. Honey, 165 Neb. 494, 86 N.W.2d 187 (1957).

Sureties contract that the defendant shall appear and abide the orders of the court, and in the event of the principal's default, are bound by their obligation. State v. Wilson, 202 S.W.3d 665 (Mo. Ct. App. W.D. 2006). As to rights and liabilities of sureties, generally, see §§ 99 to 120.

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8A Am. Jur. 2d Bail and Recognizance § 73

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VI. Nature of Bond or Recognizance; Sureties

A. In General

§ 73. Construction and validity of bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 55, 62

Since a bail bond is sometimes considered to be in the nature of a contract,[1] it is subject to the rules of construction applicable to contracts, generally.[2] The extent of each party's undertaking therefore depends on the wording of the agreement, and the intention of the parties as interpreted within the general framework of suretyship and contract law.[3]

Comment:

A bail bond is, strictly speaking, a type of legally mandated bond. Yet, most litigation concerning bail bonds relates not to suretyship issues, but to the interpretation of the bonds themselves and to issues unique to their relationship to the criminal justice system.[4]

As sometimes stated, the application of a bail bond depends on its wording and the applicable laws of the jurisdiction,[5] and, in the absence of any conflict with statutory provisions,[6] the bond is construed and applied by the courts according to its express terms.[7] In this regard, a court is not authorized to modify a bail bond's plain meaning under the guise of interpretation,[8] and a bond may not be construed by the courts in such a manner as to create liabilities not stated in the contract.[9]

Generally, the terms of a bail contract are strictly construed in the surety's favor.[10] The controlling consideration is the reasonable intentions of the parties.[11]

The language of the bail bond is generally sufficient if it advises the sureties of the obligations of their principal and of their liability on the principal's failure to meet those obligations.[12] The trial court is generally considered the proper forum in which to determine the sufficiency of a bail bond.[13]

Appearance bonds requiring that a defendant appear before a named court in reference to the case in which it is given have been construed as not requiring an appearance before another court in the same case.[14] Thus, a bond made returnable to a specific court may not be transferred to any other court.[15]

A bail bond taken without authority is void[16] and binds neither the principal[17] nor the sureties.[18]

Footnotes

1 § 72.

2 U.S. v. Figuerola, 58 F.3d 502 (9th Cir. 1995); People v. Marshall, 527 P.2d 929 (Colo. App. 1974); State v. Valles, 140 N.M. 458, 2004-NMCA-118, 143 P.3d 496 (Ct. App. 2004); Seneca Ins. Co. v. People, 40 A.D.3d 1151, 834 N.Y.S.2d 581 (3d Dep't 2007); Com. v. Hill, 180 Pa. Super. 430, 119 A.2d 572 (1956).
As to the general rules of construction of contracts, see Am. Jur. 2d, Contracts §§ 323 to 393.

3 U.S. v. Martinez, 613 F.2d 473 (3d Cir. 1980); State v. Tuthill, 389 N.J. Super. 144, 912 A.2d 146 (App. Div. 2006).

4 Restatement Third, Suretyship and Guaranty § 71, comment g.

5 Western Sur. Co. v. U.S., 72 F.2d 457 (C.C.A. 9th Cir. 1934); State v. Spring, 180 Tenn. 506, 176 S.W.2d 817 (1944).
Bail bonds are governed by statute. All Star Bonding v. State, 119 Nev. 47, 62 P.3d 1124 (2003).

6 State v. Spring, 180 Tenn. 506, 176 S.W.2d 817 (1944).

7 La Grotta v. U.S., 77 F.2d 673, 103 A.L.R. 527 (C.C.A. 8th Cir. 1935); State v. Spring, 180 Tenn. 506, 176 S.W.2d 817 (1944).
The express terms of the contract govern its interpretation. Swanson v. U.S., 15 Alaska 608, 224 F.2d 795 (9th Cir. 1955).

8 Com. v. Hill, 180 Pa. Super. 430, 119 A.2d 572 (1956).

9 Umatilla County v. United Bonding Ins. Co., 248 Or. 328, 434 P.2d 329 (1967).
As to liabilities of sureties on bail bonds, generally, see §§ 99 to 120.

10 U.S. v. Martinez, 613 F.2d 473 (3d Cir. 1980); Swanson v. U.S., 15 Alaska 608, 224 F.2d 795 (9th Cir. 1955) (construing Alaska law); State v. Ericksons, 1987-NMSC-108, 106 N.M. 567, 746 P.2d 1099 (1987); Seneca Ins. Co. v. People, 40 A.D.3d 1151, 834 N.Y.S.2d 581 (3d Dep't 2007).

11 U.S. v. Martinez, 613 F.2d 473 (3d Cir. 1980).

12 Knight v. Maricopa County, 53 Ariz. 540, 91 P.2d 269 (1939).

13 Wagner v. U.S., 250 F.2d 804 (9th Cir. 1957).

14 Swanson v. U.S., 15 Alaska 608, 224 F.2d 795 (9th Cir. 1955).

15 Cullifer v. State, 101 Ga. App. 231, 113 S.E.2d 218 (1960).

16 Resolute Ins. Co. v. State, 290 So. 2d 599 (Miss. 1974); People v. Wirtschafter, 305 N.Y. 515, 114 N.E.2d 18 (1953); State v. Bowser, 232 N.C. 414, 61 S.E.2d 98 (1950).

17 State v. Bowser, 232 N.C. 414, 61 S.E.2d 98 (1950).

18 § 154.

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VI. Nature of Bond or Recognizance; Sureties

A. In General

§ 74. Form and content of bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 55, 57 to 59

Forms

Forms relating to bail bonds, generally, see Am. Jur. Legal Forms 2d, Bail and Recognizance; Am. Jur. Pleading and Practice Forms, Bail and Recognizance [Westlaw®(r) Search Query]

Forms relating to appearance bonds, generally, see Am. Jur. Pleading and Practice Forms, Criminal Procedure; Am. Jur. Pleading and Practice Forms, Federal Criminal Procedure; Federal Procedural Forms, Criminal Procedure [Westlaw®(r) Search Query]

In some jurisdictions, a court is afforded great latitude in formulating bail, and the court may require that bail be in the form of a deposit, a recognizance, or such other form as the judge having jurisdiction to try the offense may determine.[1]

The form of a bail bond form may be prescribed by statute.[2] Slight variations in the form prescribed by statute[3] or technical defects[4] will generally not invalidate a bond, and curative statutes may save it from certain defects, such as a failure to supply a date in a statutory form.[5] A bail bond that fails as a statutory bond will not be treated as a valid common-law obligation.[6]

Observation:

References to the "victim" and the "victim's family" in a preprinted form order setting ancillary conditions of a pretrial bond was not a predetermination of guilt, in violation of defendant's right to a fair trial, where the order did not contain any findings of fact, it was not prepared for use before the jury, and there was no indication that the jury ever saw the order.[7]

Where a description of the crime is required, because the surety is obligated only with regard to the offense stated in the bond,[8] it is sufficient if the language used to describe the offense is adequate to identify the charge before the court with reasonable certainty.[9]

Footnotes

1 State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

2 State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248 (1944).

3 Young v. State, 173 Tenn. 469, 121 S.W.2d 533 (1938).
A surety who is not harmed by an irregularity in the bond is estopped from denying its regularity. State v. Myers, 221 La. 173, 59 So. 2d 111 (1952).
Proper collateral security was posted, where a portion of an appearance bond containing the description of collateral security contained the notation “PN/IA,” and the public defender represented that the abbreviation meant Promissory Note/Indemnity Agreement. Bethel v. State, 898 So. 2d 176 (Fla. 3d DCA 2005).

4 U.S. v. Noriega-Sarabia, 116 F.3d 417 (9th Cir. 1997).

5 Miller v. State, 125 Ind. App. 358, 125 N.E.2d 177 (1955).

6 People v. Wirtschafter, 305 N.Y. 515, 114 N.E.2d 18 (1953).

7 Ex Parte Victorick, 453 S.W.3d 5 (Tex. App. Beaumont 2014), petition for discretionary review refused, (Mar. 18, 2015).

8 A-Alternative Release Bail Bonds v. Martin County, 882 So. 2d 414 (Fla. 4th DCA 2004).

9 State Fire & Cas. Co. v. State, 88 So. 2d 274 (Fla. 1956).

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A. In General

§ 75. Pledging property for bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 54.1

Statutes in some states specify the procedures by which real property owned by a state resident and located in the state may be pledged for a defendant's bail.[1] A state statute that made a distinction between personal property and real property for the purpose of securing a bail bond regarding the amount of the net value of the property needed to secure bail in a particular amount, was held valid.[2]

Footnotes

1 State v. Blake, 642 So. 2d 959 (Ala. 1994) (holding that such a statute was not unconstitutionally vague or overbroad, and that the procedure established did not unreasonably burden a defendant's right to a property bond and did not violate the defendant's equal protection rights on that basis).

2 People ex rel. Hardy, on Behalf of Miller v. Sielaff, 79 N.Y.2d 618, 584 N.Y.S.2d 742, 595 N.E.2d 817 (1992) (noting that the double equity requirement with regard to real property enables the court to accept it as security without being concerned about potential title or hidden defects, and was a reasonable means of ensuring that the value would be adequate).

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VI. Nature of Bond or Recognizance; Sureties

A. In General

§ 76. Sureties on bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 60, 69

Constitutional provisions prescribing a right to bail[1] generally provide that persons will be bailable by "sufficient sureties."[2] Sureties should be persons of sufficient financial ability and of sufficient vigilance to secure the defendant's appearance and prevent absconding.[3] Judges must use discretion in determining whether a surety can honor these obligations,[4] and a court has a broad power to reject a bond when it believes a surety is insufficient or otherwise disqualified.[5]

It is within the trial court's discretion to increase the number of sureties after the accused has absconded and been returned by law enforcement officers.[6] However, a bail statute allowing a court to hear evidence on the sufficiency of sureties did not authorize a court order regarding the sufficiency of sureties on bonds under a specified amount, where the statute did not authorize the court to determine the sufficiency of a surety in any manner the court deemed proper and did not remove the function of determining the sufficiency of a surety from the discretion of the sheriff or a judicial commissioner.[7]

The federal statute requires that a surety provide the court with information regarding the value of the assets and liabilities of the surety, if other than an approved surety, and the nature and extent of encumbrances against the surety's property.[8] Furthermore, the surety must have a net worth of sufficient unencumbered value to pay the amount of the bail bond.[9] Every surety, except a corporate surety that is approved as provided by law, must demonstrate by affidavit that its assets are adequate.[10]

An officer of the court may decline to accept a bond where the justification is shown to be inadequate.[11] However, justification of the sureties is not a part of the bond, so that if the bond is not rejected, the liability of the sureties is not affected by that failure.[12]

Footnotes

1 §§ 11 to 13.

2 Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (2016); Henley v. Taylor, 324 Ark. 114, 918 S.W.2d 713 (1996); State v. Ayala, 222 Conn. 331, 610 A.2d 1162 (1992); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995); Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997); Ex parte Dennis, 334 So. 2d 369 (Miss. 1976); Lopez-Matias v. State, 504 S.W.3d 716 (Mo. 2016); State v. Steele, 430 N.J. Super. 24, 61 A.3d 174 (App. Div. 2013); State ex rel. Sylvester v. Neal, 140 Ohio St. 3d 47, 2014-Ohio-2926, 14 N.E.3d 1024 (2014); State v. Sauve, 159 Vt. 566, 621 A.2d 1296 (1993); Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

3 Western Sur. Co. v. People, 120 Colo. 357, 208 P.2d 1164 (1949).

4 Miller v. Pulaski County Circuit Court, 284 Ark. 55, 679 S.W.2d 187 (1984).

5 State ex rel. Howell v. Schiele, 85 Ohio App. 356, 40 Ohio Op. 234, 54 Ohio L. Abs. 471, 88 N.E.2d 215 (1st Dist. Hamilton County 1949), judgment aff'd, 153 Ohio St. 235, 41 Ohio Op. 249, 91 N.E.2d 5 (1950).

6 Wallace v. State, 193 Tenn. 182, 245 S.W.2d 192, 29 A.L.R.2d 941 (1952).

7 Graham v. General Sessions Court of Franklin County, 157 S.W.3d 790 (Tenn. Ct. App. 2004) (court order stated that bonds in the amount of $4,400 or less will be on the signature of two property owners living in the county, and property tax receipts and signatures of the parties are sufficient).

8 18 U.S.C.A. § 3142(c)(1)(B)(xii).

9 18 U.S.C.A. § 3142(c)(1)(B)(xii).

10 Fed. R. Crim. P. 46(e) (also specifying what the court may require that the affidavit describe).

11 Ex parte Tartar, 278 Mo. 356, 213 S.W. 94 (1919).

12 § 99.

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8A Am. Jur. 2d Bail and Recognizance VI B Refs.

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B. Execution and Delivery

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Research References

West's Key Number Digest

West's Key Number Digest, Bail 55, 61, 64, 70

A.L.R. Library

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B. Execution and Delivery

§ 77. Execution and delivery of bail bond, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 55, 64

Where a bail bond is required by statute, and the manner of execution is specified, a bond not executed substantially as required is generally insufficient,[1] although minor informalities are not generally enough to invalidate the bond.[2]

The person executing a bail bond must be competent; thus, an intoxicated person cannot execute a valid bail bond.[3] However, a recognizance is not rendered unenforceable by the fact that it was executed by a person who previously had been judicially adjudged insane, where a judgment of restoration was rendered before the execution of the recognizance and it did not appear that the person was actually insane at the time of the execution.[4]

Footnotes

1 Wilkins v. State, 130 Tex. Crim. 36, 91 S.W.2d 354 (1936) (purported execution of surety by attorney in fact). A magistrate should reject a bond, where the surety failed to execute the bond, the notary's jurat is not attached, and no justification in the required amount is shown. Harding v. McCullough, 236 Iowa 556, 19 N.W.2d 613 (1945).

2 Young v. State, 173 Tenn. 469, 121 S.W.2d 533 (1938) (the defendant signed as “Herb” rather than “Herbert”).

3 McClanahan v. State, 232 Ind. 567, 112 N.E.2d 575 (1953).

4 State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927 (1947).

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B. Execution and Delivery

§ 78. Signing of bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 55, 64

Where the signature of a surety on a bail bond is required, a signature on the justification without a signature on the bond itself is not sufficient.[1] A person who intended to serve as bail in a civil case, but merely initialed the summons, although the applicable statute required that the bail endorse one's proper name on the writ, was not bound.[2]

In any case, a defendant is entitled to a hearing and an opportunity to correct deficiencies in an appearance bond that did not contain the signatures of the sureties, where the bond was filed and approved by a justice court judge.[3] The mere failure of the principal to sign a bail bond does not affect the liability of the sureties.[4]

A recognizance is taken in open court and entered on the order book; it is considered valid without the signature or seal of the obligors and is witnessed by the record instead of by signatures or seals.[5]

Observation:

The sureties who sign the bond are generally held to have consented to its terms.[6]

Footnotes

1 Duree v. State, 1924 OK 1098, 107 Okla. 251, 231 P. 292 (1924).
As to justification, generally, see § 76.

2 Aero Indus. Equipment Co. v. Chernick, 85 R.I. 373, 132 A.2d 77 (1957).

3 Dixon v. State, 528 So. 2d 832 (Miss. 1988).

4 § 99.

5 Grillo v. Cannistraro, 147 Conn. 1, 155 A.2d 919 (1959).

6 La Grotta v. U.S., 77 F.2d 673, 103 A.L.R. 527 (C.C.A. 8th Cir. 1935).
As to rights and liabilities of sureties, generally, see §§ 99 to 120.

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B. Execution and Delivery

§ 79. Approval, acceptance and acknowledgment of bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 61, 70

Forms

Forms relating to approving, accepting, or acknowledging bail, generally, see Am. Jur. Pleading and Practice Forms, Bail and Recognizance [Westlaw®(r) Search Query]

The trial court will not automatically approve a bail bond.[1] A judge may not be forced to accept a bond, nor can a judge arbitrarily deny one.[2]

Where required, the acknowledgment of a recognizance must be taken before the court[3] or some officer of the court authorized to take the acknowledgment.[4] The taking of the acknowledgment is a ministerial, rather than a judicial, function.[5]

A bail bond properly executed and acknowledged before some authorized person and filed in court, and accepted as a compliance with the order allowing bail, is enforceable by the court without the necessity of its being acknowledged in open court.[6]

Caution:

It is a federal crime for a person to acknowledge, or procure to be acknowledged in any court of the United States, a recognizance or bail in the name of any other person not privy or consenting to it.[7]

CUMULATIVE SUPPLEMENT

Cases:

By its broad terms, statute allowing a court to examine the sufficiency of a bail bond permits a court to determine whether the collateral securing the insurance company bail bond is so deficient that it fails to ensure the criminal defendant's return to court in contravention of public policy. N.Y. CPL § 520.30(1). People ex rel Prieston on behalf of Beaubrun v. Nassau County Sheriff's Department, 34 N.Y.3d 177, 114 N.Y.S.3d 275, 137 N.E.3d 1100 (2019).

[END OF SUPPLEMENT]

Footnotes

1 People v. Villanueva, 61 Misc. 3d 1020, 85 N.Y.S.3d 694 (N.Y. City Crim. Ct. 2018) (defendant did not prove by a preponderance of evidence that money to repay an indemnitor's credit cards for charges incurred for a bond company would come from lawful means, and thus the trial court would not approve the bail bond).

2 Miller v. Pulaski County Circuit Court, 284 Ark. 55, 679 S.W.2d 187 (1984).

3 Thomsen v. State, 82 Neb. 634, 118 N.W. 330 (1908).

4 State v. Bradsher, 189 N.C. 401, 127 S.E. 349, 38 A.L.R. 1102 (1925).

5 Clatsop County v. Wuopio, 95 Or. 30, 186 P. 547 (1920); State v. Charnock, 105 W. Va. 8, 141 S.E. 403, 56 A.L.R. 1094 (1928).

6 State v. Bradsher, 189 N.C. 401, 127 S.E. 349, 38 A.L.R. 1102 (1925).

7 18 U.S.C.A. § 1506.

8A Am. Jur. 2d Bail and Recognizance § 80

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B. Execution and Delivery

§ 80. Delivery of bail bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 55, 64

Timely delivery of a bond is essential to its validity.[1] Where a bond is delivered to an officer of the court on the condition that it is not to become effective until it is signed by other parties, delivery is not valid until that condition is met.[2]

Footnotes

1 Joseph v. State, 161 Tex. Crim. 85, 274 S.W.2d 689 (1954).

2 State v. Foxley, 68 Utah 41, 249 P. 125 (1926).

8A Am. Jur. 2d Bail and Recognizance VI C Refs.

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C. Deposit of Cash or Eligible Obligations in Lieu of Bail

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bail 73, 96

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C. Deposit of Cash or Eligible Obligations in Lieu of Bail

§ 81. Cash bail or deposit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73

Forms

Forms relating to cash bail, generally, see Am. Jur. Pleading and Practice Forms, Bail and Recognizance [Westlaw®(r) Search Query]

"Cash bail bond" consists of money posted on the condition that it will be forfeited if the defendant does not comply with the court's directions requiring the defendant's attendance.[1] The underlying legal theories behind bail bonds and cash bail are different; in bail bonds the law looks to the surety to guarantee the defendant's appearance, while in cash bail the law looks to the money already in the hands of the state to insure defendant's appearance.[2] When the entire amount of bail is deposited in cash, the statutes governing bail and appearance bonds may not apply.[3]

While release, on the making of a deposit in lieu of bail, is illegal, in the absence of a statute providing for deposits in lieu of bail,[4] state statutes often permit cash deposits in lieu of bail.[5] A "deposit of cash," authorized by a clause in a court rule, may be an option a trial court may order along with the primary condition of a bond.[6] A "split bond," consisting of a personal recognizance bond in a specified amount and a specified surety bond may be allowed under an authorizing statute, and may be advantageous to a defendant who is unable to deposit the full amount required to obtain one's release.[7]

It has been said that the only purpose in requiring a cash deposit is to make it available to satisfy a forfeiture in the event of the principal's willful default.[8] Under some pretrial release rules, cash bail is available only as a last resort, and only when it is the least onerous condition that will secure the defendant's appearance or protect the public.[9] The use of cash-only bail to keep a defendant in jail is not permitted if the purpose of so doing is not to secure the defendant's appearance or to protect the victim, the community, or any other person.[10]

Footnotes

1 Perry v. Aversman, 168 S.W.3d 541 (Mo. Ct. App. W.D. 2005).
"Cash bail" is where cash in an amount equal to, or part of, the total amount of bail is paid into court. Williams v. City of Montgomery, 739 So. 2d 515 (Ala. Civ. App. 1999).

2 State v. Barton, 181 Wash. 2d 148, 331 P.3d 50 (2014).

3 State v. Paul, 95 Wash. App. 775, 976 P.2d 1272 (Div. 3 1999).

4 Brasfield v. Town of Milan, 127 Tenn. 561, 155 S.W. 926 (1913); Brooks v. Epperson, 164 Va. 37, 178 S.E. 787 (1935); Lee v. Severyns, 151 Wash. 403, 276 P. 94 (1929).

5 Holcombe v. Pierce, 253 Ala. 173, 43 So. 2d 640 (1949); People v. Hoover, 119 P.3d 564 (Colo. App. 2005); Wilson v. State, 167 Ga. App. 421, 306 S.E.2d 704 (1983); Sneed v. State, 946 N.E.2d 1255 (Ind. Ct. App. 2011); Lopez-Matias v. State, 504 S.W.3d 716 (Mo. 2016).

6 City of Yakima v. Mollett, 115 Wash. App. 604, 63 P.3d 177 (Div. 3 2003).

7 Frontier Ins. Co. v. State, 64 S.W.3d 481 (Tex. App. El Paso 2001).

8 U.S. v. Jones, 607 F.2d 687, 58 A.L.R. Fed. 671 (5th Cir. 1979).

9 Bradds v. Randolph, 239 Md. App. 50, 194 A.3d 444 (2018).

10 State v. Jackson, 384 S.W.3d 208 (Mo. 2012).

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C. Deposit of Cash or Eligible Obligations in Lieu of Bail

§ 82. Eligible obligations as security for release on bail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73

A person required under a law of the United States to give a surety bond may give an eligible obligation as security instead of a surety bond.[1] For these purposes, an "eligible obligation" means any security designated as acceptable in lieu of a surety bond by the Secretary of the Treasury.[2] Such an obligation must be given to the official having authority to approve the surety bond,[3] and authorize the official receiving the obligation to collect or sell the obligation if the person defaults on a required condition.[4]

Footnotes

1 31 U.S.C.A. § 9303(a).

2 31 U.S.C.A. § 9301(2).

3 31 U.S.C.A. § 9303(a)(1).

4 31 U.S.C.A. § 9303(a)(3).
31 U.S.C.A. § 9303(b) provides for the depositing of such an obligation by the official receiving it.
As to the amount of such an obligation, see § 86.

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C. Deposit of Cash or Eligible Obligations in Lieu of Bail

§ 83. Constitutionality of limiting bail to deposit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bail 73

A statute or court order setting monetary bail that may be satisfied only by a cash deposit may violate state constitutional provisions guaranteeing that all persons are bailable by sufficient sureties.[1] However, court rules authorizing cash bail did not violate other states' "sufficient sureties" provisions, since those provisions were interpreted to confer a measure of discretion to the person overseeing the bail process, and designed to guarantee that the defendant would appear.[2] It has also been observed in this regard that the purpose of bail is to ensure the presence of the defendant, and that a "cash only" provision does not restrict a defendant's constitutional rights pending trial.[3]

Judicial immunity bars an agent of a surety company from maintaining an action against a judge and other officials for deprivation of income resulting from a court policy of only accepting cash bail, and the agent does not have standing to object to that policy as violating the sufficient sureties provision of a state constitution.[4]

A city's bail policy, under which only cash bail or complete payment of outstanding fines would be available under capias warrants, did not violate a constitutional provision that secured to incarcerated defendants the right to bail that is not excessive before conviction, since the provision did not apply to postconviction bail.[5]

Footnotes

1 State v. Brooks, 604 N.W.2d 345 (Minn. 2000), as modified, (Mar. 15, 2000); Smith v. Leis, 106 Ohio St. 3d 309, 2005-Ohio-5125, 835 N.E.2d 5 (2005); State v. Hance, 180 Vt. 357, 2006 VT 97, 910 A.2d 874 (2006). A statute permitting a judge to set cash-only bail if it will best guarantee the accused's further presence did not violate the sufficient sureties clause in the state constitution, so long as the accused is permitted access

to a surety in some form; however, if the accused shows that the bail determination absolutely barred using a surety of some form, the court is constitutionally bound to accommodate the accused, but the defendant does not have the absolute right of access to a commercial bail bond. State v. Briggs, 666 N.W.2d 573 (Iowa 2003).

2 Ex parte Singleton, 902 So. 2d 132 (Ala. Crim. App. 2004); Fragoso v. Fell, 210 Ariz. 427, 111 P.3d 1027 (Ct. App. Div. 2 2005); Lopez-Matias v. State, 504 S.W.3d 716 (Mo. 2016); State v. Gutierrez, 140 N.M. 157, 2006-NMCA-090, 140 P.3d 1106 (Ct. App. 2006).

The methods for securing "sufficient sureties" under a constitutional provision governing bail can include cash-only bail, as determined in the discretion of the trial court and subject to the constitutional safeguard that bail not be excessive. Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

3 Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (2016).

4 Smith v. City of Hammond, 848 N.E.2d 333 (Ind. Ct. App. 2006).

5 Williams v. City of Montgomery, 739 So. 2d 515 (Ala. Civ. App. 1999).

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8A Am. Jur. 2d Bail and Recognizance § 84

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Bail and Recognizance

Karl Oakes, J.D.; and Marie K. Pesando, J.D.

VI. Nature of Bond or Recognizance; Sureties

C. Deposit of Cash or Eligible Obligations in Lieu of Bail

§ 84. Disposition of money deposited in lieu of bail

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Forms

Forms relating to money deposited, generally, see Am. Jur. Pleading and Practice Forms, Bail and Recognizance [Westlaw®(r) Search Query]

The disposition of funds deposited in lieu of bail depends on the purpose for which the deposit was made and the statute under which it was required, and the deposit must be returned on the accomplishment of that purpose.[1] Where money is deposited under a statute that merely requires a bond or bail to assure the defendant's presence in court, the deposit is not a recognizance to cover any eventuality or contingency that may arise, and its effectiveness expires when the defendant appears or is produced in court.[2] When a cash bail bond is posted to secure the a defendant's release, the clerk holds the funds while the defendant is at large, and the money is later returned to the depositor, unless the bond is forfeited due to the defendant's failure to appear.[3] Funds may be returned on a refusal to indict and the resulting dismissal of the complaint.[4]

The disbursement or release of the money deposited is subject to the subsequent order of the court that authorized the deposit,[5] although the court is not invested with an arbitrary or unlimited discretion concerning what may be done with the funds deposited.[6]

When the entire amount of bail is posted in cash, the cash is conclusively presumed to belong to the defendant, regardless of who produced it and holds a receipt.[7] A statute may provide that moneys deposited as bail by a third person are treated as property of the defendant, who has the substantial right in the possible deprivation of that property.[8]

Footnotes

1 Heine v. U.S., 135 F.2d 914 (C.C.A. 6th Cir. 1943) (appearance).

2 Chancer v. Chancer, 308 N.Y. 204, 124 N.E.2d 283 (1954).

3 Bond Forfeiture, Amwest Sur. Ins. Co. v. State, 750 N.E.2d 865 (Ind. Ct. App. 2001).

4 People on Complaint of Donovan v. Rounati, 258 A.D. 585, 17 N.Y.S.2d 199 (1st Dep't 1940).

5 People on Complaint of Donovan v. Rounati, 258 A.D. 585, 17 N.Y.S.2d 199 (1st Dep't 1940).

6 Chancer v. Chancer, 308 N.Y. 204, 124 N.E.2d 283 (1954).

7 State v. Paul, 95 Wash. App. 775, 976 P.2d 1272 (Div. 3, 1999).

8 State v. Brendel, 2016 ND 230, 887 N.W.2d 316 (N.D. 2016).

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8A Am. Jur. 2d Bail and Recognizance § 85

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VI. Nature of Bond or Recognizance; Sureties

C. Deposit of Cash or Eligible Obligations in Lieu of Bail

§ 85. Disposition of money deposited in lieu of bail—Application to payment of assessment, fine, restitution, penalty, or costs

Topic Summary | Correlation Table | References

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A.L.R. Library

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547
Propriety, after obligors on appearance bond have been exonerated pursuant to Rule 46(f) of Federal Rules of Criminal Procedure, of applying cash or other security to fine imposed on accused, 58 A.L.R. Fed. 676

Statutes sometime specifically provide for the application of cash in lieu of bail in satisfaction of a fine or costs following a conviction.[1] A state statute providing that an accused may obtain pretrial release by depositing with the court clerk 10% of the amount of the bail, but on performance of the conditions of the bail bond, the clerk will return only 90% of the deposit and will retain the other 10% as bail bond costs, does not violate the due process clause with regard to an accused ultimately found innocent, as assessing a court cost or a cost for exercising the right to release pending trial, where the retention was for an administrative cost imposed on all those, guilty and innocent alike, who sought the benefit of the bail statute, rather than a cost of prosecution, which, under state law, was imposed only on a convicted defendant.[2] Some statutes allow the use of bail money for fines and costs, but not for restitution.[3]

The courts have generally refused to allow the application of bail to a fine or costs where there is no statutory authority for doing so,[4] basically for the reason that the bail was discharged once the defendant met the conditions by appearing at trial.[5] On the other hand, it has been recognized that although case law and tradition indicate that the primary purpose and condition is

to assure the accused's presence, a trial court may impose additional conditions, such as for subsequent payment of costs and fines.[6] Some courts have rejected constitutional challenges to the application of bail to the defendant's costs or fines, despite arguments that such an application rendered the bail excessive under the Eighth Amendment because it went beyond the purpose of bail, which is to ensure the presence of the defendant, on the basis that the Eighth Amendment applied only to the setting of bail and not the use of bail money after conditions of bail have been met.[7]

Where the depositor of the cash bail was someone other than the defendant, some courts have refused to employ a presumption that money deposited on behalf of the defendant was the defendant's money, and held that the application of the bail to a fine was improper.[8] On the other hand, statutes authorizing the application of cash deposits for fines or costs have sometimes been construed as authorizing the retention of the money for the payment of a fine or costs, regardless of the fact that the money deposited as bail was that of third persons.[9] Furthermore, the application of a third party's deposit to the payment of fines and costs has been allowed where the language of the particular bail form used indicated that the funds deposited could be used to satisfy fines.[10] Courts have also, in some instances, relied on case law as creating a presumption that money deposited for the defendant's bail belonged to the defendant, and therefore could be used to pay fines imposed on the defendant.[11] Cash bail could be applied to satisfy a fine, despite the defendant's claim that bail was deposited by the bondsman, where the trial court found that the defendant deposited the bail, and the defendant took an assignment of all of the bondsman's rights to the money.[12]

Under federal law, on the motion of the United States Attorney, the court must order any money belonging to and deposited by or on behalf of the defendant with the court for the purposes of a criminal appearance bail bond—for trial or appeal—to be held and paid to the United States Attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed on the defendant. The court may not release any money deposited for bond purposes after a guilty plea or a verdict has been entered and before sentencing, except on a showing that an assessment, fine, restitution or penalty cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship.[13] While a cash bond deposited by defendant in order to secure his or her presence at sentencing remains available for application toward the defendant's restitution obligation even though the defendant has assigned the bond to a third party,[14] the federal statute does not apply to any third-party surety.[15] The statute does not violate the Excessive Fines Clause of the Eighth Amendment.[16]

Footnotes

1 People v. Caro, 753 P.2d 196 (Colo. 1988); State v. Isenberg, 393 N.W.2d 13 (Minn. Ct. App. 1986); Kasper v. State, 206 Tenn. 434, 333 S.W.2d 934, 92 A.L.R.2d 1081 (1960).

2 Schilb v. Kuebel, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).

3 Martinez v. State of Nevada, 120 Nev. 200, 88 P.3d 825 (2004).

4 State v. McKichan, 219 Neb. 560, 364 N.W.2d 47 (1985); Com. v. McDonald, 476 Pa. 217, 382 A.2d 124 (1978).

5 State v. Paul, 95 Wash. App. 775, 976 P.2d 1272 (Div. 3 1999).

6 Perry v. Aversman, 168 S.W.3d 541 (Mo. Ct. App. W.D. 2005).

7 State v. Bailey, 120 Ariz. 399, 586 P.2d 648 (Ct. App. Div. 2 1978); State v. Iglesias, 185 Wis. 2d 117, 517 N.W.2d 175, 42 A.L.R.5th 909 (1994).

8 State v. Gutierrez Barajas, 153 Ariz. 511, 738 P.2d 786 (Ct. App. Div. 2 1987); State v. Harshman, 156 Ohio App. 3d 452, 2004-Ohio-1202, 806 N.E.2d 598 (3d Dist. Seneca County 2004) (in the absence of the third party's voluntary consent, and a local rule did not constitute consent).

9 People v. Rayburn, 258 Ill. App. 3d 331, 196 Ill. Dec. 598, 630 N.E.2d 533 (3d Dist. 1994); Com. v. Tanur, 355 Pa. Super. 188, 512 A.2d 1276 (1986); Kasper v. State, 206 Tenn. 434, 326 S.W.2d 664 (1959).

10 People v. Foreman, 153 Ill. App. 3d 346, 106 Ill. Dec. 184, 505 N.E.2d 731 (2d Dist. 1987).

11 State v. Grant, 44 Or. App. 671, 606 P.2d 1166 (1980).

12 Story v. State, 326 Ark. 86, 929 S.W.2d 709 (1996).

13 28 U.S.C.A. § 2044.

The purpose of 28 U.S.C.A. § 2044 is to enable the government to collect certain outstanding payments owed by the defendant. The statute codifies the discretion courts have long exercised to pay, on a proper motion, bond or bail money to the parties with a legally established superior claim to it. U.S. v. Equere, 916 F. Supp. 450 (E.D. Pa. 1996).

14 U.S. v. Sortini, 497 Fed. Appx. 738 (9th Cir. 2012).

15 28 U.S.C.A. § 2044.

28 U.S.C.A. § 2044 grants courts the authority to transfer bail funds if the defendant's own money has been used to post bond, but does not extend that authority to a situation in which a third party, not a defendant, has provided one's own money to post the defendant's bail. U.S. v. Equere, 916 F. Supp. 450 (E.D. Pa. 1996).

Bail money posted by a defense attorney on behalf of a defendant, which the attorney paid out of retainer money paid by the defendant, belonged to the defense attorney, and could not be held by the government to be applied to the defendant's unpaid fine. U.S. v. Sparger, 79 F. Supp. 2d 714 (W.D. Tex. 1999).

16 U.S. v. Higgins, 987 F.2d 543 (8th Cir. 1993).

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